

**THE UTILISATION OF UBUNTU CAN PROMOTE ACCOUNTABILITY IN PUBLIC
OFFICIALS AND STATE INSTITUTIONS AS WELL AS GIVE EFFECT TO SOCIAL
SOLIDARITY IN SOUTH AFRICA**

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In loving memory of Fatima Salie (26 August 1980 - 7 October 2018).

The extraordinary editor of my doctoral thesis AND the most beautiful, spirited and cheekiest sister in the whole wide world.

You are forever more mom's 'poppie lops' - the jewel in the crown.

Love always,

DDD.

ABSTRACT

TITLE: The utilisation of ubuntu can promote accountability in public officials and state institutions as well as give effect to social solidarity in South Africa.

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DATE: 1 February 2018

INTRODUCTION

The primary thrust of my work is to cast aside vacuous claims about ubuntu whilst emphasising the communal obligations' focus of ubuntu. The state is duty-bound to give effect to socio-economic rights as enshrined in the Constitution. Ubuntu, with reference to its communal obligations' focus, could serve to facilitate the realisation of critical socio-economic rights as well as forge social solidarity. It is submitted that public officials that embrace ubuntu, as defined by an unwavering focus on communal obligations, will give effect to their duties (as provided for in the Constitution) as a means to create a just and caring nation-state.

METHODOLOGY

This is a mixed-methods study which delves into specific aspects of public law, anthropology and political philosophy. Political philosophy is explored as a means to develop a nuanced understanding of ubuntu whilst the anthropology discipline is utilised in order to develop a firm grasp of the lived reality of vulnerable groups.

There is a specific focus on Constitutional Court jurisprudence (as pertaining to the progressive realisation of socio-economic rights as well as ubuntu) and the relevant international law obligations of the Republic of South Africa (i.e. the 2015 ratification of the International Covenant on Economic, Social and Cultural Rights).

FINDINGS

An exploration of political philosophy sheds light on the political landscape within which ubuntu is deployed and serves to confirm that to discuss ubuntu is to engage in a political act. The discipline of anthropology can make a telling contribution to the application and reception of law by providing textured insights of the lived reality of vulnerable groups.

The Constitutional Court should utilise the minimum core obligation approach as a means to provide critical determinate content for key socio-economic rights. Furthermore, the Constitutional Court should embrace an oversight role in ensuring that the state does in fact progressively realise the subsistence rights of vulnerable groups.

Ubuntu can in fact mesh with a human rights regime. This thesis serves to confirm the manner in which ubuntu, understood as an unwavering focus on communal obligations, can promote the accountability of public officials in South Africa (as well as foster social solidarity) by facilitating the progressive realisation of constitutionally guaranteed socio-economic rights. However, the expectations demanded of ubuntu should be tempered in the absence of an economic transition to fundamentally transform the living conditions of vulnerable groups.

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CHAPTER 1: INTRODUCTION

1.1 Introductory outline

The inspiration for this thesis came about as a result of my exposure to the inner workings of a state-owned enterprise between 2010 and 2015. I was initially appointed as a legal advisor but subsequently assumed a management position in the risk and compliance arena. It is in this latter role that I bore witness to a worrying trend of damaging lapses in accountability. I consequently sought to explore mechanisms that would bolster accountability and contribute to the betterment of society.

It is for the abovementioned reasons that this thesis will explore how the utilisation of ubuntu can promote accountability amongst public officials and within state institutions as well as give effect to social solidarity in South Africa. The reality is that ubuntu is used widely in South Africa and has tangible political and ethical potency.¹ The primary thrust of my engagement with ubuntu is to showcase the communal obligations' focus of ubuntu which is at the core of ubuntu philosophy.² In this regard there will be a specific analysis of the accountability of the state in progressively realising socio-economic rights as enshrined in the Constitution.³ The state is duty-bound to advance socio-economic rights (and in so doing give effect to interconnected and interdependent civil and political rights) as well as strive to realise the aspirational aims in the Constitution so as to create a sanctuary for all people living in South Africa.

The utilisation of the communal obligations' focus of ubuntu will give effect to a just and caring community through an innate understanding that all members of a nation-state are interconnected and

¹ Cornell D 'Exploring ubuntu-tentative reflections' available at www.fehe.org/index.php?id=281, (accessed 17 June 2016).

² Bowler DA 'Concluding reflections: the fierce urgency of now' in Praeg L & Magadla S (eds) *Ubuntu: Curating the Archive* (2014) 197 (hereafter Concluding reflections).

³ Constitution of the Republic of South Africa, 1996.

interdependent.⁴ Thus, ubuntu (as defined below) can in fact mesh with a human rights regime.⁵ It should be noted that public officials that 'embrace' ubuntu or are 'imbued with ubuntu' should be understood to mean those public officials that have an unwavering focus on communal obligations and seek to give effect to continuous humanising acts⁶ as a means to create a just and caring nation-state. Consequently, those very same officials will strive to give effect to their official duties (with reference to their mandated functions in terms of the relevant sections of the Constitution and with special emphasis on the realisation of socio-economic rights) as a means to discharge their communal obligations.

Ubuntu could play a critical role in promoting accountability on the part of the state (as represented by duly appointed public officials) in so far as giving effect to socio-economic rights (and aspirational values) as enshrined in the Constitution. Thus, if ubuntu could play a pivotal role in shaping a just and caring nation-state, in which the interdependence and interconnectedness of members living side by side is recognised and celebrated, then it follows that ubuntu can make a meaningful contribution to forging social solidarity⁷ in South Africa.

1.2 Brief definition of ubuntu

Ubuntu is a Zulu word that has been linked with the Tswana word *botho* to form the value known as *ubuntu-botho* and it has found traction in that very form which is indicative of it being a 'South African expression in the complexity of its meaning'.⁸

Metz proposed that the definition of ubuntu in which 'a person is a person through other persons' could be rendered clearer by defining ubuntu as meaning that 'a person becomes a real person through communal

⁴ Cornell D & van Marle K 'Exploring ubuntu-tentative reflections' in Cornell D & Muvangua N (eds) *Ubuntu and the Law-African Ideals and Post-Apartheid Jurisprudence* (2012) 362 (hereafter Exploring ubuntu).

⁵ Praeg L *A Report on Ubuntu* (2014) 136 (hereafter *Report on Ubuntu*).

⁶ Praeg L *Report on Ubuntu* (2014) 20.

⁷ Social solidarity is to be understood as people living side by side in a manner in which all people are treated as having equal worth on the basis of our shared humanity.

⁸ Cornell D 'Ubuntu and subaltern legality' in Praeg L & Magadla (eds) *Ubuntu: Curating the Archive* (2014) 167 (hereafter Subaltern legality).

relationships'.⁹ However, it is important to note that the routinely quoted meaning of ubuntu as 'a person only becomes a person through other people' is the product of people engaging with each other on a daily basis rather than an engagement by people with an inert concept called 'community'.¹⁰ Furthermore, ubuntu is deemed to encompass the key values of group solidarity, compassion, respect and human dignity but at its core it seeks to impart humanity and morality.¹¹ However, the rich promise of ubuntu is not fully grasped at present as it possesses untapped potential in highlighting, shaping and enforcing the obligations of public officials and state institutions as well as its ability to foster social solidarity.¹²

Ubuntu will be comprehensively defined in Chapter 2, with specific reference to the present day political landscape, as a means to undertake a properly situated and nuanced discussion of ubuntu. Praeg persuasively argues for the contextualisation of the ubuntu discussion so as to recognise that to speak about ubuntu is first and foremost a political act.¹³ A critical feature of this same discussion is the manner in which communal obligations flow as a rule from ubuntu and that benevolent coercion (in terms of which members are pressured to conform to community ideals) is ever-present in all talk of ubuntu.¹⁴ Furthermore, there is a compelling need to cast aside vacuous claims about the unique and/or magical qualities of ubuntu as it undermines the legitimacy of the role that ubuntu could play in nurturing our shared humanity.¹⁵ It is for the abovementioned reasons that this thesis will

⁹ Metz T 'Ubuntu as a Moral Theory and Human Rights in South Africa' (2011) 11 *African Human Rights Law Journal* 537 (hereafter Ubuntu as a moral theory).

¹⁰ Cornell D 'Exploring ubuntu-tentative reflections' available at www.fehe.org/index.php?id=281, (accessed 17 June 2016).

¹¹ *S v Makwanyane and Another* 1995 (6) BCLR (CC) para 308 (hereafter *Makwanyane*).

¹² Bohler-Müller N 'Some thoughts on the ubuntu jurisprudence of the Constitutional Court' in Cornell D & Muvangua N (eds) *Ubuntu and the Law: African Ideals and Post-Apartheid Jurisprudence* (2012) 370 (hereafter Ubuntu jurisprudence).

¹³ Praeg L *Report on Ubuntu* (2014) 5.

¹⁴ Praeg L *Report on Ubuntu* (2014) Introduction.

¹⁵ Praeg L *Report on Ubuntu* (2014) Introduction.

maintain an unwavering focus on the core element of ubuntu which is herein defined as giving effect to communal obligations.

Praeg utilises the form 'ubuntu' to 'refer to the living practice' and 'Ubuntu' to 'refer to the abstract postcolonial articulation of the practice as philosophy'.¹⁶ However, the distinction between 'ubuntu' and 'Ubuntu' will not be observed in this thesis apart from engaging with the political philosophy insights as offered by Praeg in Section 2.4.¹⁷ The aforementioned distinction by Praeg has considerable merit in so far as providing the necessary context in nuanced political discussions. However, this does not significantly detract from the primary focus of ubuntu (as understood and defined in this thesis) as giving effect to communal obligations. I would submit, in any event, that 'ubuntu' rather than 'Ubuntu' should be utilised (if compelled to choose between the two forms as proposed by Praeg) as the communal obligations focus advanced in this thesis is the true embodiment of a living praxis. Furthermore, the distinction between 'ubuntu' and 'Ubuntu' is not observed in Constitutional Court jurisprudence nor in legal circles (at present) and it is best to avoid confusion in this regard. Thus, 'ubuntu' rather than 'Ubuntu' will generally be utilised in the text outside of engagement with the political philosophy material as advanced by Praeg in Section 2.4 as previously noted.

This thesis will seek to ascertain the obligations that flow as a rule when deploying and/or embracing ubuntu. This could entail the state meeting the critical needs of its most vulnerable citizens/groups which could in turn serve to foster social solidarity. In this vein Justice Mokgoro seeks to redefine citizenship in her *Khosa and Others v Minister of Social Development (Khosa)*¹⁸ ruling by ensuring that our constitutional values reflect not only a just community but a caring one as well.¹⁹ Furthermore, it should be noted that embracing ubuntu gives rise to a deep-seated

¹⁶ Praeg L & Magadla S 'Introduction' in Praeg L & Magadla S (eds) *Ubuntu: Curating the Archive* (2014) 3 (hereafter Introduction).

¹⁷ Praeg L & Magadla S 'Introduction' (2014) 3.

¹⁸ *Khosa and Others v Minister of Social Development and Others* 2004 (6) BCLR 569 (CC) (hereafter *Khosa*) para 65.

¹⁹ Cornell D & van Marle K 'Exploring ubuntu' (2012) 362.

awareness of the interdependence and interconnectedness of human beings and in this manner also serves to forge social solidarity.

It should be noted that any nuanced discussion of ubuntu will as a rule explore the relevant insights offered by anthropology as well as (political) philosophy.²⁰ Thus, the compelling contribution by Praeg (as related to political philosophy) is specifically acknowledged (and consequently explored) in this thesis. In addition, this thesis also explores specific aspects of the anthropology discipline as a means to develop a firm grasp of the lived reality of vulnerable people in any given society. Thus, this thesis will explore anthropology and political philosophy so as to fashion definitive insights into the manner in which law is experienced on the ground. In addition, the deployment of ubuntu to promote accountability amongst public officials (as well as bolster the reception of law in South Africa) will also be analysed.

1.3 A problem statement pertaining to the plight of vulnerable groups in South Africa

The following passage by Chaskalson P in *Soobramoney v Minister of Health, KwaZulu-Natal (Soobramoney)*²¹ contains an illuminating account of the state of the nation in 1997, yet it remains an apt description of present day life in South Africa:

‘We live in a society in which there are great disparities in wealth. Millions of people are living in deplorable conditions and in great poverty. There is a high level of unemployment, inadequate social security, and many do not have access to clean water or adequate health services. These conditions already existed when the Constitution was adopted and a commitment to address them, and to transform our society into one in which there will be human dignity, freedom and equality, lies at the heart of our new

²⁰ Cornell D & van Marle K ‘Exploring ubuntu’ (2012) 362.

²¹ *Soobramoney v Minister of Health, KwaZulu-Natal* 1998 (1) SA 765 (CC) (hereafter *Soobramoney*).

constitutional order. For as long as these conditions continue to exist that aspiration will have a hollow ring.’²²

In light of the above quote, it should be apparent that the state (in a contemporary context) should play a more effective role in giving effect to the minimum social and economic well-being of individuals as required by the socio-economic rights enshrined in the Bill of Rights. Thus, public officials that discharge their constitutional obligations in the required manner and with the necessary diligence (and in so doing demonstrate their accountability) can greatly improve the lives of citizens (with a specific prioritisation of the urgent needs of vulnerable people). Consequently, this serves to demonstrate the concrete link between the accountability of public officials and the (possible) improvement in the quality of lives of vulnerable groups. It is of pivotal importance to focus on the Constitutional Court jurisprudence on socio-economic rights as well as our international law commitments with specific reference to the International Covenant on Economic, Social and Cultural Rights (‘International Covenant’ or ‘ICESCR’).²³ This is necessary so as to grasp the nature and extent of the duties owed by the state in devising (and subsequently) implementing benchmarked sectoral targets to progressively alleviate the suffering of vulnerable groups.

The harsh reality is that the progressive realisation of socio-economic rights is unlikely to yield any permanent, wholesale improvement in the living conditions of the most vulnerable groups in the immediate or foreseeable future in South Africa (without the introduction of a powerful catalyst that is) if regard is had for the performance of the state since the advent of democracy. It is submitted that ubuntu, if properly framed and deployed, can serve to colour and give effect to the socio-economic rights and aspirational values as enshrined in the Constitution. Thus, an analysis of Constitutional Court cases focusing on ubuntu will be

²² *Soobramoney* (1998) para 8.

²³ UN General Assembly, International Covenant on Economic, Social and Cultural Rights, 16 December 1966, United Nations, Treaty Series, vol. 993 available at: <http://www.refworld.org/docid/3ae6b36c0.html> (accessed on 31 July 2016) (hereafter International Covenant).

undertaken (both in defining ubuntu and deliberating on its role in a constitutional democracy) so as to provide the necessary legal context for a nuanced discussion about the (possible) contemporary role of ubuntu in South Africa.

Ubuntu, in light of its communal obligations' focus, serves to animate the urgency attached to the realisation of socio-economic rights (in providing for the pressing needs of vulnerable groups) in the shortest possible time. Also, there is a need for the public to develop a better understanding of their constitutionally guaranteed rights (with a specific focus on socio-economic rights that can fundamentally change the lives of vulnerable people). Thus, the duties of the state as related to information dissemination²⁴ will be explored as a function of prioritising the urgent needs of vulnerable people. Furthermore, there is a critical need to secure a suitable platform for vulnerable citizens to engage with ordinary public officials as a means to provide the local representatives of the state with insight as to the issues of deprivation as endured by vulnerable groups within their communities. This may include lobbying those same (ordinary) public officials as a means to drive beneficial changes from the bottom up.

Zulu believes that the realisation of the dream in attaining the common good (which is defined in this thesis as the creation of a just and caring society) is that much more difficult to achieve due to the absence of a 'coherent value consensus' regarding the moral duties owed by public officials.²⁵ It is my firm belief that ubuntu is well suited to fulfil the role of providing the 'coherent value consensus' required to ensure that public officials and state institutions faithfully discharge their respective obligations against a clearly defined standard.²⁶ The aforementioned 'coherent value consensus' role of ubuntu can be meshed with the Constitution as the supreme law of the land as contained in section 2 of

²⁴ Please see Section 3.4.1.

²⁵ Zulu P *A Nation in Crisis: An Appeal for Morality* (2013) 30 (hereafter *A Nation in Crisis*).

²⁶ Zulu P *A Nation in Crisis* (2013) 30.

the Constitution.²⁷ This in turn will give rise to the consequent duties borne by public officials to give effect to the realisation of socio-economic rights (as well as shaping a deep-seated awareness of the transformative nature of the Constitution) in seeking to dismantle the legacy of apartheid.²⁸

1.4 Sojourn at the Department of Anthropology at the University of Copenhagen

My sojourn, as a visiting PhD Researcher in the Department of Anthropology at the University of Copenhagen (between February 2015 and September 2015) provided me with a nuanced perspective of accountability, integration and social solidarity as experienced in Denmark. I was also exposed to the manner in which law is interpreted, implemented, revised and resisted on the ground as well as the perceived limitations of law. There was a specific focus on exploring the lived reality of vulnerable groups in Denmark (i.e. the specific challenges faced by immigrants and refugees with regards to integration in that social solidarity is understood by the majority of Danes as signifying sameness rather than embracing differences) as compared to vulnerable groups in South Africa.²⁹

1.5 The methodology utilised in the preparation of this doctoral thesis

This is a mixed-methods study which delves into specific aspects of public law, anthropology and political philosophy. The aforementioned study will offer a nuanced critique of ubuntu.

Comparisons are drawn between Denmark and South Africa in relation to the manner in which the aforementioned states engage with specific vulnerable groups. There is a specific focus on vulnerable groups in South Africa who are determined to secure access to critical socio-economic rights while the specific focus in relation to Denmark is analysing the manner in which refugees and immigrants engage with the

²⁷ Constitution of the Republic of South Africa, 1996.

²⁸ Roux T 'Understanding Grootboom-a response to Cass R. Sunstein' *Forum Constitutional* 12:2 (2002) 43 (hereafter Understanding Grootboom).

²⁹ Please see Chapter 4.

Danish welfare state and explore ways of negotiating a life of purpose in a land where social solidarity is equated with sameness (rather than embracing difference). There is also a comparison drawn between the respective states of South Africa and Uganda and their specific approach to combating HIV Aids as a means to explore the accountability and political will of the respective states.

The primary sources of information will be relevant Danish and South African case law and legislation. The secondary sources of information (in relation to studies in Denmark, South Africa and Uganda) will be books, relevant articles in journals, newspapers and reputable internet sites.

There is a specific focus on socio-economic rights as well as ubuntu (i.e. its role in a contemporary context) in relevant Constitutional Court jurisprudence so as to better appreciate the nature and extent of the obligations owed by the state in relation to the socio-economic rights enshrined in the Constitution.

An exploration of the international law obligations of the Republic of South Africa as related to the ICESCR is undertaken.³⁰ In this regard the recent ratification of the ICESCR will be analysed so as to better appreciate the additional duties borne by the Republic of South Africa under international law.³¹

The abovementioned seven month sojourn at the University of Copenhagen in 2015 provided me with definitive insight regarding the contested nature of the political construction that is 'integration' (as well as its perpetual link with the concept of social solidarity) and the plight of immigrants and refugees in Denmark. Also, I attended a semester course on Legal Anthropology as a means to familiarise myself with key anthropology concepts and themes. Furthermore, I was fortunate to be mentored by a number of anthropology professors at the University of

³⁰ International Covenant <http://www.refworld.org/docid/3ae6b36c0.html>, (accessed 31 July 2016).

³¹ International Covenant <http://www.refworld.org/docid/3ae6b36c0.html>, (accessed 31 July 2016).

Copenhagen. The aforementioned one-on-one structured engagement sessions with various professors proved to be an extraordinary platform to expand my knowledge of anthropological concepts as related to the core concept of 'lived reality' as well as the reception of law on the ground. However, it is critical to note at the outset that this thesis should in no way be construed as encompassing a fully-fledged anthropology research project.

1.6 The aims and objectives of this doctoral thesis

The primary focus in this thesis is to shed light on the nature and extent of the duties of the state (and by implication the duties of the relevant public officials and state institutions as representatives of the state) in giving effect to socio-economic rights as an expression of its accountability to the public.

The underlying objective of this thesis is to ascertain the manner in which ubuntu, understood as an unwavering focus on communal obligations, could promote the accountability of public officials so as to fashion a just and caring nation-state. Thus, the basic premise that will be explored is that greater accountability on the part of public officials (in faithfully giving effect to the relevant constitutional provisions coupled with embracing the communal obligations' focus of ubuntu) will shape a just and caring society in which social solidarity ideals will be forged and sustained. The broader objective will be to advance a nuanced approach in bolstering the content and reach of those same constitutionally protected rights (in the shortest possible time) so that vulnerable groups can derive the maximum possible benefit from those same rights.

This body of work aims to advocate a better understanding of political philosophy so as to develop a nuanced understanding of the contribution that ubuntu could make in a contemporary context as well as promoting insight about the manner in which anthropological insights (with specific reference to the concept of 'lived reality') can enhance our understanding of the interpretation, application and resistance to law on the ground. Furthermore, this thesis will seek to maintain a specific focus on

transforming the lived reality of vulnerable groups so as to make a meaningful contribution to the betterment of society.

1.7 Summary

This chapter sought to demonstrate the definitive link between the accountability of public officials in giving effect to socio-economic rights (as enshrined in the Constitution) and ubuntu (understood as embracing the primacy of communal obligations). This chapter also cast light on how the progressive realisation of socio-economic rights will serve to forge social solidarity through striving to treat all people as having equal worth. Furthermore, the exploration of specific aspects of political philosophy as well as anthropology is essential in developing definitive insights into ubuntu (and the application of law) in a contemporary context.

Ubuntu will be analysed in Chapter 2 so as to cast aside vacuous claims in order to fashion an enlightened understanding of ubuntu. Furthermore, Chapter 2 will provide the necessary insight in negotiating the political landscape within which ubuntu has been deployed so as to grasp the manner in which the definition and nature of ubuntu is constantly contested and revised.

It should be noted that Chapter 3 is divided into Part A and Part B. Part A of Chapter 3 is focussed on the accountability of the state to give effect to the progressive realisation of critical socio-economic rights. The relevant provisions of the Constitution, which serve to inform the accountability of the state, are explored. The international law commitments of the Republic of South Africa (with specific reference to the ratification of the International Covenant) are also explored. Furthermore, the minimum-core obligation approach, as advanced by Bilchitz³², is analysed at length.

Part A will also explore the pressing need on the part of the state to give effect to the progressive realisation of socio-economic rights as a means to cast light on the nature and extent of the duties owed by the state to

³² Please see Section 3.5.

the public. Furthermore, the manner in which ubuntu can mesh with an individual human rights regime is highlighted.

Chapter 3 (Part B) will focus on the socio-economic rights jurisprudence of the Constitutional Court and the role of the Court as the guardian of the Constitution. Part B maintains an unwavering focus on the need for the Constitutional Court to provide the state with determinate content for key socio-economic rights so as to ensure that the state has the necessary guidance in meeting the critical needs of vulnerable groups. The role of ubuntu is explored in Part B in relation to the manner in which ubuntu can make a critical contribution in colouring and augmenting the accountability of public officials.

Chapter 4 serves to explore the concept of social solidarity with specific reference to the manner in which refugees and immigrants experience life in Denmark. This is contrasted with the manner in which social solidarity is likely to find traction in South Africa and the manner in which ubuntu could consolidate and sustain social solidarity principles.

Chapter 5 provides a basic exploration of key anthropology themes in order to demonstrate how anthropology can strengthen our understanding of law through shedding light on the manner in which law is applied/interpreted/resisted on the ground.

Chapter 6 sets out the key findings of the thesis as well as providing a number of recommendations.

There is also an Annexure (1), as prepared by a medical doctor, which provides illuminating insights as to the lived reality of a patient requiring renal dialysis.

CHAPTER 2: A CRITICAL EXPLORATION OF THE NATURE AND POTENTIAL OF UBUNTU

2.1 Introduction

The previous chapter sought to demonstrate the definitive link between the communal obligations focus of ubuntu and the accountability of public officials in realising constitutionally guaranteed socio-economic rights as a means to forge and (subsequently) sustain social solidarity ideals.

This chapter will seek to describe and analyse ubuntu as well as explore its utilisation in present day South Africa. In this regard it is imperative to negotiate the political landscape within which ubuntu has been deployed so as to develop a nuanced understanding of what is in fact meant (and implied) when one speaks about ubuntu in a contemporary context. Furthermore, the aforementioned analysis will include detailed observations concerning the reception and utilisation of ubuntu in the relevant Constitutional Court cases so as to outline its perceived role (and purported usefulness) in a constitutional democracy.

It is critical to note that ubuntu is a contested concept which is shaped by the dominant political discourse.³³ Nonetheless, it is my contention that communal obligations is a core component of ubuntu and a public official that embraces ubuntu will be duty-bound to contribute to the realisation of a just and caring society. The act of 'embracing' ubuntu or being 'imbued with ubuntu' (as previously explained) should be understood as giving effect to continuous humanising acts³⁴ which pay homage to the interconnectedness and interdependence of all members of the nation-state. Thus, a public official that has in fact embraced ubuntu will seek to remove hazards which imperil the lives of vulnerable groups (i.e. fellow members of the community/nation-state).

³³ Praeg L *Report on Ubuntu* (2014) Introduction.

³⁴ Praeg L *Report on Ubuntu* (2014) 20.

It is submitted that seeking to transform the lives of vulnerable people through embracing ubuntu (on the part of public officials) meshes neatly with the aspirational and transformative goals of the Constitution as enshrined in the Preamble and the Bill of Rights in the Constitution.³⁵ However, it is prudent to consider whether the values of ubuntu can conflict with the values as enshrined in the Bill of Rights.³⁶ The aforementioned contemplation is deemed necessary despite claims by a number of Constitutional Court Justices that ubuntu does indeed support the application of the Bill of Rights as well as colour the interpretation of the aforementioned document.³⁷ In addition, it is queried on what basis ubuntu is viewed as being compatible with the Bill of Rights in its entirety in the absence of a persuasive explanation and/or supporting documentation.³⁸ In this regard Himonga, Taylor and Pope highlight that group solidarity could well be in conflict with fairness (as a value) at the individual level.³⁹ Thus, contemporary ubuntu-inspired jurisprudence is viewed as providing scant indication of the manner in which ubuntu could influence the outcomes in difficult cases as compared to a situation in which ubuntu was not available as a legal concept.⁴⁰

Nonetheless, Himonga, Taylor and Pope advocate understanding ubuntu in terms of communalism which encompasses individual rights and autonomy so as to pave the way for recognising universal human rights in African cultural contexts without discarding key characteristics of ubuntu such as interdependence, dignity, solidarity and responsibility.⁴¹ The aforementioned insight aims to forge a nuanced understanding between the 'communal morality' with which ubuntu is imbued and 'the legitimacy of universal individual rights'.⁴² Himonga,

³⁵ Constitution of the Republic of South Africa, 1996.

³⁶ Himonga, Taylor & Pope 'Reflections on judicial reviews of ubuntu' (2013) (16) 5 *PELJ* 418 (hereafter Reflections).

³⁷ Himonga, Taylor & Pope 'Reflections' (2013) *PELJ* 418. Please see *Makwanyane* (1995) para 224.

³⁸ Himonga, Taylor & Pope 'Reflections' (2013) *PELJ* 418.

³⁹ Himonga, Taylor & Pope 'Reflections' (2013) *PELJ* 418.

⁴⁰ Himonga, Taylor & Pope 'Reflections' (2013) *PELJ* 418.

⁴¹ Himonga, Taylor & Pope 'Reflections' (2013) *PELJ* 420.

⁴² Himonga, Taylor & Pope 'Reflections' (2013) *PELJ* 420.

Taylor and Pope emphasise that for ubuntu to make a compelling contribution in transforming South African jurisprudence it will be necessary for the courts to in fact grapple with the interplay between communal morality and individual rights as a means to pinpoint the role (and possible contribution) of ubuntu in different scenarios and in so doing lessen the likelihood of ambiguity.⁴³ In this regard Justice Sachs offers a fitting insight as follows:

‘I believe that we should incorporate ubuntu into mainstream jurisprudence by harnessing it carefully, consciously, creatively, strategically, and with ingenuity so that age-old African social innovations and historical cultural experiences are aligned with present-day legal notions and techniques if the intention is to create a legitimate system of law for all South Africans’.⁴⁴

It is important to bear in mind that civil, political and socio-economic rights are interconnected and interdependent (as previously stated) and that a focus in this thesis on the realisation of critical socio-economic rights will provide a platform for the expression and realisation of civil and political rights as well. Furthermore, giving effect to the aforementioned body of rights (including civil and political rights) will promote social solidarity by virtue of the state treating all people as possessing equal worth.

Ubuntu is deemed to facilitate peace and social harmony by providing insight as to how to give effect to sharing in a communal setting.⁴⁵ Also, ubuntu as an ethical concept is always integral to a social bond and provides a moral framework for people that are compelled to live side by side.⁴⁶ This is why the aspirational aspect of ubuntu entails striving

⁴³ Himonga, Taylor & Pope ‘Reflections’ (2013) *PELJ* 420.

⁴⁴ Sachs A ‘Towards the liberation and revitalisation of customary law’ (1999) in Cornell D & Muvangua N (eds) *Ubuntu and the Law: African Ideals and Post-Apartheid Jurisprudence* (2012) 319.

⁴⁵ Cornell D ‘Is there a difference that makes a difference between ubuntu and dignity’ Woolman S & Bilchitz D (eds) in *Is This Seat Taken? Conversations at the Bar, the Bench and the Academy about the South African Constitution* (2012) 236 (hereafter *Is there a difference*).

⁴⁶ Cornell D ‘Is there a difference’ (2012) 236.

together to achieve the public good and a shared world.⁴⁷ The aforementioned reference to a 'shared world' should be understood as shaping a vision in which interconnected and interdependent members live side by side in a just and caring nation-state. Furthermore, Cornell rightfully believes that ubuntu is a transformative ethic at its core by virtue of it being an integral part of our social reality and this in turn explains its suitability to drive social solidarity in South Africa.⁴⁸

Cornell and van Marle support the view that an understanding of anthropology is required to grasp the potential of African philosophy and legal theory.⁴⁹ Consequently, any attempt to analyse ubuntu and deliberate on its importance as a political and ethical ideal requires an interdisciplinary approach to trace the outline of the debate.⁵⁰ It should be noted that 'tracing the outline of the debate' refers to casting aside the myopic insights routinely offered up concerning ubuntu (i.e. ubuntu being defined as boundless forgiveness and/or limited to political reconciliation) so as to acknowledge and embrace the communal obligations' focus of ubuntu. Thus, an exploration of relevant themes in political philosophy⁵¹ and anthropology⁵² are critical building blocks in analysing and shaping the debate of what ubuntu is as well as its inherent potential.⁵³ Consequently, it will be argued that ubuntu can indeed play a critical role in supporting the transformation of the lived reality of vulnerable people in South Africa.

2.2 An expanded definition of ubuntu

It is submitted that seeking to define ubuntu has been dogged by controversy. However, Praeg seeks to nurture a nuanced and critical understanding of ubuntu.⁵⁴ This is necessary to reconfigure ubuntu so

⁴⁷ Cornell D 'Is there a difference' (2012) 236.

⁴⁸ Cornell D 'Is there a difference' (2012) 236.

⁴⁹ Cornell D & van Marle K 'Exploring ubuntu' (2012) 355.

⁵⁰ Cornell D & van Marle K 'Exploring ubuntu' (2012) 355.

⁵¹ As encompassed in this Chapter as well as in Chapter 4.

⁵² As explored in Chapters 4 and 5.

⁵³ Cornell D & van Marle K 'Exploring ubuntu' (2012) 355.

⁵⁴ Praeg L *Report on Ubuntu* (2014) Introduction.

as to shed light on the true meaning and value of ubuntu.⁵⁵ However, the stated objective is not to exhaustively define ubuntu but rather to properly situate the discussion so as to highlight the pitfalls of extreme positions as to what ubuntu is and could be.⁵⁶ Furthermore, there is a definitive need to strip away inaccurate and vacuous claims concerning ubuntu as signifying unlimited forgiveness or its usefulness viewed as being confined to political reconciliation.⁵⁷

Bennett believes that it is unfortunate that defining ubuntu is based on an assumption that it describes an abstract concept or specific behaviour.⁵⁸ In this regard Bennett highlights that ubuntu would be better understood if one were to contemplate the manner and specific contexts in which the word 'ubuntu' was utilised.⁵⁹ Consequently, an analysis proceeding along these lines would assume that one would focus on the manner in which 'past and current users are constructing meanings' as opposed to 'predetermined, essentialised meanings' of ubuntu.⁶⁰ Bennett believes that ubuntu is at its core defined by a striving for social harmony.⁶¹ In addition, Justice Sachs provides insight with regards to the constitutional status of ubuntu as follows:

'... (It) has an enduring and creative character, representing the element of human solidarity that binds together liberty and equality to create an affirmative and mutually supportive triad of central constitutional values. It feeds pervasively into and enriches the fundamental rights enshrined in the Constitution'.⁶²

Thus, ubuntu is rightfully viewed as a 'lived system of norms'.⁶³ Ubuntu is ultimately concerned with inclusivity which renders it an 'ideal

⁵⁵ Praeg L *Report on Ubuntu* (2014) Introduction.

⁵⁶ Praeg L *Report on Ubuntu* (2014) Introduction.

⁵⁷ Praeg L *Report on Ubuntu* (2014) Introduction.

⁵⁸ Bennett T 'Ubuntu: an African equity' (2011) 14 *PELJ* 31 (hereafter Ubuntu).

⁵⁹ Bennett T 'Ubuntu' (2011) 14 *PELJ* 31.

⁶⁰ Bennett T 'Ubuntu' (2011) 14 *PELJ* 31.

⁶¹ Bennett T 'Ubuntu' (2011) 14 *PELJ* 35.

⁶² *Dikoko v Mokhatla* 2007 (1) BCLR 1 (CC) para 113.

⁶³ Bennett T 'Ubuntu' (2011) 14 *PELJ* 48.

overarching vehicle for expressing shared values' as a means to facilitate the development of a vibrant plural legal culture.⁶⁴

The Final Constitution (1996) does not expressly refer to ubuntu.⁶⁵ However, the aforementioned Constitution did recognise customary law subject to the provisions of the Constitution.⁶⁶ In this regard the courts are obliged to give effect to customary law 'when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law'.⁶⁷ However, ubuntu and customary law is not one and the same thing.⁶⁸ Ubuntu is nonetheless a core component of customary law through informing the manner in which African communal relations and dispute resolution are handled.⁶⁹ It is believed that the recognition of ubuntu and customary law is intimately linked to the transformative nature of the Constitution.⁷⁰

It is also believed that the casting of ubuntu as a constitutional value in *Makwanyane* renders it 'an inherently normative notion'.⁷¹ Thus, clarifications sought in defining ubuntu (in a similar fashion to other 'ethically-loaded constitutional concepts' such as dignity and equality *et al*) is inextricably linked with moral questions.⁷² However, it is important to maintain an unwavering focus on devising a largely uncontested understanding of ubuntu as a means to undertake critical interpretive work (as related to the Bill of Rights) in forging a democratic society based on dignity, freedom and equality.⁷³

In *Makwanyane* Langa J (as he then was) highlighted the considerable degree to which ubuntu overlapped with other critical rights as enshrined

⁶⁴ Keep H & Midgley R 'The emerging role of ubuntu-botho in developing a consensual South African legal culture' in Bruinsma F & Nelken D (eds) *Explorations in Legal Cultures* (2007) (hereafter Emerging role).

⁶⁵ Himonga, Taylor & Pope 'Reflections' (2013) *PELJ* 373.

⁶⁶ Section 211(3) of the Constitution of the Republic of South Africa, 1996.

⁶⁷ Section 211(3) of the Constitution of the Republic of South Africa, 1996.

⁶⁸ Himonga, Taylor & Pope 'Reflections' (2013) *PELJ* 373.

⁶⁹ Himonga, Taylor & Pope 'Reflections' (2013) *PELJ* 373.

⁷⁰ Himonga, Taylor & Pope 'Reflections' (2013) *PELJ* 373.

⁷¹ Himonga, Taylor & Pope 'Reflections' (2013) *PELJ* 380. Please see *Makwanyane* (1995) para 306.

⁷² Himonga, Taylor & Pope 'Reflections' (2013) *PELJ* 380.

⁷³ Himonga, Taylor & Pope 'Reflections' (2013) *PELJ* 380.

in the Constitution.⁷⁴ In this regard he made mention of how ubuntu coveted life and human dignity.⁷⁵ Langa J stated that ubuntu served to demonstrate that ‘the life of another person is at least as valuable as one’s own’ and that ‘respect for the dignity of every person is integral to this concept’.⁷⁶ Furthermore, Mokgoro J held that life and dignity are ‘like two sides of the same coin’ and ‘the concept of ubuntu embodies them both’.⁷⁷ Mokgoro J noted with approval that the Preamble to the ICESCR emphasises that ‘human rights derive from the inherent dignity of the human person’⁷⁸ following which she stated that ‘this, in my view, is not different from what the spirit of ubuntu embraces’.⁷⁹ Thus, ubuntu should be viewed as ‘a way of seeing ourselves and of articulating how we should behave’.⁸⁰ It is noted that the need for ubuntu might be scrutinised if the Constitution encompasses other concepts which give effect to the same values.⁸¹ This specific concern will be addressed later in this chapter.⁸²

There is a demonstrated need to explore ubuntu as a philosophical and ethical concept with specific reference to ‘the meaning of law, legal obligation and the understanding of the social bond’ so as to fashion a better understanding of what ubuntu is and how it can in fact promote accountability.⁸³ In this regard the manner in which ubuntu is presented in contemporary times (so as to reflect seemingly inherent characteristics of both human rights and Christianity discourses) is likely to undermine claims of its original content and/or unique perspective.⁸⁴ There is consequently a need to exercise caution when seeking to advance an argument that the expression of ubuntu is adequately

⁷⁴ *Makwanyane* (1995) para 225.

⁷⁵ *Makwanyane* (1995) para 225.

⁷⁶ *Makwanyane* (1995) para 225.

⁷⁷ *Makwanyane* (1995) para 310.

⁷⁸ *Makwanyane* (1995) para 308.

⁷⁹ *Makwanyane* (1995) para 308.

⁸⁰ Himonga, Taylor & Pope ‘Reflections’ (2013) *PELJ* 389.

⁸¹ Himonga, Taylor & Pope ‘Reflections’ (2013) *PELJ* 390.

⁸² Please see Section 2.7 (re Criticisms of ubuntu).

⁸³ Cornell D & Muvangua N ‘Ubuntu and the law: African ideals and post-apartheid jurisprudence’ (2012) 1.

⁸⁴ Praeg L *Report on Ubuntu* (2014) 53.

captured by a human rights regime even though there is a compelling argument for ubuntu to be viewed as the Spirit of Law.⁸⁵ Ubuntu could in fact play a pivotal role in providing constructive insights and criticism of the constitutional democracy (and the attendant prioritisation of individual human rights) in South Africa.⁸⁶ However, it is critical to bear in mind that ubuntu can in fact mesh with a human rights regime as previously stated.

Mbembe views ubuntu (or human mutuality) as the underlying principle of the Constitution.⁸⁷ Praeg disagrees with the aforementioned view as he believes that dignity would be typecast as the underlying principle (if such a *Grundnorm* did in fact exist) and he further believes that the ties between ubuntu and the Constitution are 'infinitely more complex'.⁸⁸ Thus, the critical aim in law should not be to exhaustively define ubuntu but rather to ascertain how ubuntu (as an expression of our shared humanity) can engage with a constitutional democracy (premised on an individual rights regime) in a manner which will unleash the emancipatory potential of ubuntu.⁸⁹ Praeg views ubuntu as a marker for our shared humanity and believes that humanism/ubuntu is best depicted in 'quasi-transcendental terms' in that humanism/ubuntu is an abstract concept that cannot be comprehensively defined.⁹⁰ However, it is plausible to utilise that same concept to create a better world despite the recognition that the utilisation of the aforementioned concept will inevitably remain incomplete.⁹¹

I am in firm agreement with Praeg as to exploring the manner in which ubuntu can in fact mesh with (as well as enrich) an individual rights regime in South Africa. Furthermore, there is a need to guard against

⁸⁵ Praeg L *Report on Ubuntu* (2014) 54.

⁸⁶ Praeg L *Report on Ubuntu* (2014) 54.

⁸⁷ Mbembe A 'Democracy as a community of life' (The Johannesburg Salon 4), http://www.jwtc.org.za/volume_4/achille_mbembe.htm, accessed 1 August 2016.

⁸⁸ Praeg L *Report on Ubuntu* (2014) 75.

⁸⁹ Praeg L *Report on Ubuntu* (2014) 136.

⁹⁰ Praeg L *Report on Ubuntu* (2014) 189.

⁹¹ Praeg L *Report on Ubuntu* (2014) 189.

seeking to exhaustively define ubuntu prior to utilising it to advance and colour the realisation of key socio-economic rights.

2.3 Tracing the history of ubuntu up to and including its application in a contemporary context

Ubuntu is said to be covered in a 'kaross of mystery'⁹² as it is not possible to 'trace the exact denotation of the word in its vernacular origins'.⁹³ Nonetheless, it seems to have first appeared in 'nation-wide public discourse' in South Africa during the 1920s when it was utilised by the Zulu cultural movement, Inkatha, to nurture respect for traditional Zulu values.⁹⁴

It is necessary to trace the history of ubuntu (since its inclusion in the post-amble of the Interim Constitution⁹⁵) and how its meaning and significance as a value/philosophy have been fiercely debated ever since.⁹⁶ This includes the manner in which ubuntu has provided gloss to seasoned legal arguments and how it has on occasion been utilised to prioritise socio-economic rights over individual property rights.⁹⁷

It is a sobering assessment of the contemporary state of affairs that ubuntu and African humanism continue to exist on a normative plane in that it represents an idealistic view rather than the lived reality of ordinary people as governed by the (as yet untransformed) state.⁹⁸ It is fair comment that African humanism will be derided as 'a meaningless intellectual pastime' if it is not set to work to transform the actual lives of ordinary Africans and in so doing shatter the shackles of poverty and other insidious forms of oppression.⁹⁹ Coertze sheds light on the 'original concept of ubuntu/botho' and seeks to demonstrate the two subsequent

⁹² Bennett T 'Ubuntu' (2011) 14 *PELJ* 31.

⁹³ Bennett T 'Ubuntu' (2011) 14 *PELJ* 31.

⁹⁴ Bennett T 'Ubuntu' (2011) 14 *PELJ* 31.

⁹⁵ Constitution of the Republic of South Africa, Act 200 of 1993.

⁹⁶ Praeg L *Report on Ubuntu* (2014) 245.

⁹⁷ Praeg L *Report on Ubuntu* (2014) 245.

⁹⁸ Biney A 'The historical discourse on African humanism: interrogating the paradoxes' in Praeg L & Magadla S (eds) *Ubuntu: Curating the Archive* (2014) 42 (hereafter *The historical discourse on African humanism*).

⁹⁹ Biney A 'The historical discourse on African humanism' (2014) 42.

semantic shifts that fashioned the contemporary understanding of ubuntu.¹⁰⁰ Ubuntu/*botho*, in its original form, is viewed as follows:

- Comprised of both positive and negative qualities in describing humanity;¹⁰¹
- The logic of interdependence, which is rendered visible in practice through kinship-based activities, facilitates the reciprocal performance of obligations and duties in a perpetual fashion within the extended family through a 'process of enculturation';¹⁰² and
- The presence of a measure of constitutive violence is inevitable (in all communitarian philosophies) due to the unavoidable tension between solidarity and coercion.¹⁰³

Furthermore, the research conducted by Coertze has provided a telling insight as follows:

'There are no proverbs or sayings ... in which either ubuntu or *botho* were explained or praised as abstract concepts (but the observance of the abstract qualities of kindness, goodwill and high moral standards ... were all extolled in concrete situations between relatives, friends or persons having common interests or speaking the same language'.¹⁰⁴

Praeg believes that this did not imply that there was no 'abstract recognition of our interdependence' but rather that the tug and pull of social interaction was defined by ritual acts of conduct that exemplified and resonated with ubuntu.¹⁰⁵ Praeg further believes that a broader

¹⁰⁰ Coertze RD 'Ubuntu and nation building in South Africa' (2001) *South African Journal of Ethnology* 24(4) 113 (hereafter Ubuntu and nation building).

¹⁰¹ Coertze RD 'Ubuntu and nation building' (2001) *South African Journal of Ethnology* 24(4) 113.

¹⁰² Coertze RD 'Ubuntu and nation building' (2001) *South African Journal of Ethnology* 24(4) 114.

¹⁰³ Coertze RD 'Ubuntu and nation building' (2001) *South African Journal of Ethnology* 24(4) 114.

¹⁰⁴ Coertze RD 'Ubuntu and nation building' (2001) *South African Journal of Ethnology* 24(4) 115.

¹⁰⁵ Praeg L *Report on Ubuntu* (2014) 51.

understanding and/or utilisation of ubuntu, so as to go beyond the confines of values, expressed in the performance of culturally specific acts in a culturally specific environment, came about at a later stage.¹⁰⁶ In this regard the cultural political economy of obligation was severely affected by socio-economic changes in South Africa as brought about by colonialism and the related twin offerings of industrialisation and urbanisation.¹⁰⁷ Thus, colonialism and urbanisation brought about the decimation of a 'coherent ubuntu praxis' rather than the cessation of ubuntu outside of rural areas in South Africa.¹⁰⁸

Urbanisation and colonialism are consequently viewed as responsible for the expansion of traditional ubuntu praxis 'so that it no longer referred to local, kinship-based and visible communities of metaphysical locality, but rather to larger, imagined communities of political practice'.¹⁰⁹ Thus, Coertze believes that the reciprocal nature of ubuntu was (out of necessity) broadened to incorporate people working side by side or those that lived in the same neighbourhood.¹¹⁰ This was subsequently (and inevitably) extended to include all of humanity which represented a critical shift in the formulation of ubuntu as an abstract concept.¹¹¹ Consequently, ubuntu was no longer confined to members of a specific society giving effect to their reciprocal duties under the guise of a formal community of members.¹¹² In time, the definition of ubuntu became meshed with individual human rights as well as Christianity discourses so as to be understood by people (from all walks of life) who shared a common purpose as evidenced by membership of political communities (which could include a united nation-state) in celebrating their shared humanity.¹¹³

¹⁰⁶ Praeg L *Report on Ubuntu* (2014) 51.

¹⁰⁷ Praeg L *Report on Ubuntu* (2014) 51.

¹⁰⁸ Praeg L *Report on Ubuntu* (2014) 51.

¹⁰⁹ Praeg L *Report on Ubuntu* (2014) 52.

¹¹⁰ Coertze RD 'Ubuntu and nation building' *South African Journal of Ethnology* 24(4) (2001) 115.

¹¹¹ Praeg L *Report on Ubuntu* (2014) 52.

¹¹² Praeg L *Report on Ubuntu* (2014) 52.

¹¹³ Praeg L *Report on Ubuntu* (2014) 53.

Himonga believes that the legal theory of ubuntu, as advanced by Metz,¹¹⁴ serves to provide an overview of ubuntu understood as ‘as an African-inspired and dignity-based moral principle’.¹¹⁵ This flowed from Metz’s analysis of *Makwanyane*¹¹⁶ in which Metz highlighted that the three principles of ubuntu are rightdoing, wrongdoing and dignity.¹¹⁷ The rightdoing principle consists of two elements in ‘shared ends’ and ‘solidarity’ and is conceived as the desire to ‘live harmoniously or to honour communal relationships’.¹¹⁸ The wrongdoing principle seeks to deter/prohibit actions which bring about excessive friction/discord in relationships unless it is a response to a foreseeable/actual act of discord by another person.¹¹⁹ The third principle seeks to clarify the concept of human dignity in detailing that an act is wrong if it lessens/undermines the human dignity of the actor as it will reduce the ability of that same actor to engage in harmonious relationships.¹²⁰

Himonga provides persuasive insights as to the flawed reasoning employed by Metz in that Metz advances a radical view of communitarianism rather than a moderate view of communitarianism (with the latter form recognising individual identity/rights alongside communal obligations).¹²¹ A further flaw in Metz’s theory is that personhood is seemingly a relative term with one person being capable of being more of a person than another.¹²² The final flaw highlighted by Himonga is that she questions why Metz did not canvass the spiritual

¹¹⁴ Metz T ‘Human dignity, capital punishment, and an African moral theory: Toward a new philosophy of human rights’ *Journal of Human Rights* (2010) 81-99 (hereafter ‘An African moral theory’).

¹¹⁵ Himonga C ‘Exploring the concept of ubuntu in the South African legal system’ (2011) *U Kischel et al Ideologie und Weltanschauung im Recht* 16 (hereafter ‘Exploring the concept of ubuntu’).

¹¹⁶ *Makwanyane* (1995).

¹¹⁷ Metz T ‘An African moral theory’ *Journal of Human Rights* (2010) 84.

¹¹⁸ Metz T ‘An African moral theory’ *Journal of Human Rights* (2010) 84.

¹¹⁹ Metz T ‘An African moral theory’ *Journal of Human Rights* (2010) 92.

¹²⁰ Metz T ‘An African moral theory’ *Journal of Human Rights* (2010) 94.

¹²¹ Himonga C ‘Exploring the concept of ubuntu’ (2011) *U Kischel et al Ideologie und Weltanschauung im Recht* 19.

¹²² Himonga C ‘Exploring the concept of ubuntu’ (2011) *U Kischel et al Ideologie und Weltanschauung im Recht* 20.

component of ubuntu in his theory.¹²³ Nonetheless, Himonga advances a compelling argument (based on the theory of Metz) that ‘it is un-ubuntu for people to live in extreme poverty, and that the state and citizens endowed with resources must, therefore, protect vulnerable people from this condition against material want’.¹²⁴

Menkiti provides additional insight regarding the unique (traditional) African world view of humanity as exhibiting three key features which require careful contemplation:

‘the communal group as a rule trumps the lived reality and/or aspirations of the individual; the living-dead¹²⁵ forms an integral part of the moral community and the concept of “processual personhood” in which full personhood is something which is realised after the performance of various acts over an extended period of time’.¹²⁶

However, it is rightfully contended that processual personhood needs to be reimagined so as to reflect that a ‘person with ubuntu’ (as a consequence of his/her ritualised transformation through honouring his obligations towards other people) is at the very least a rights-bearing individual whose full personhood is accepted without question.¹²⁷ Furthermore, it is of critical importance that the concept of auto-violation, in which the image of pre-colonial Africa has been recast so as to obliterate any traces of individualism and stratification and sustain the distorted view of precolonial African societies as comprised of nothing but communalism, should be acknowledged.¹²⁸ Thus, the role of ubuntu is not to decimate every trace of individualism but rather to ensure that

¹²³ Himonga C ‘Exploring the concept of ubuntu’ (2011) *U Kischel et al Ideologie und Weltanschauung im Recht* 20.

¹²⁴ Himonga C ‘The right to health in an African cultural context: the role of ubuntu in the realisation of the right to health with special reference to South Africa’ (2013) *55 Journal of African Law* 183.

¹²⁵ The living-dead is understood in this thesis as comprised of the spirits of deceased elders as understood and embraced in African religion.

¹²⁶ Menkiti I ‘Person and community in African traditional thought’ in Wright RA (ed) *African Philosophy: An Introduction* (1984) 171.

¹²⁷ Praeg L *Report on Ubuntu* (2014) 60.

¹²⁸ Praeg L *Report on Ubuntu* (2014) 154.

the individualism which takes hold in a postcolonial African society is not constructed in a manner which endangers the legitimate needs of vulnerable groups.¹²⁹ This is in keeping with the belief (as advanced in this thesis) that ubuntu, understood as an unerring focus on communal obligations, can indeed mesh with a human rights regime in South Africa. Consequently, the abovementioned perspectives regarding ubuntu serve to illustrate the critical role it can play in forging social solidarity in a nation-state in which all people are treated with equal respect. This can in part be achieved by prioritising the realisation of the socio-economic rights of vulnerable people facing threats to their survival at the expense of people (that do not face a similar threat to their survival) but are willing to make the necessary sacrifices if so required.¹³⁰ The aforementioned sacrifices could include the postponement or scuppering of life projects in an environment of supposed moderate scarcity.¹³¹

2.4 The political environment in which 'Ubuntu' is deployed

It should be noted that the distinction between 'ubuntu' as a living praxis and 'Ubuntu' as an abstract philosophy will only be utilised in this specific section (i.e. Section 2.4) of the thesis so as to explore the political landscape as outlined by Praeg.¹³² In this regard it is submitted that it is necessary for public officials to develop an intimate understanding of the political landscape (in which Ubuntu is deployed) so as to ensure an awareness of the manner in which key concepts are contested and revised in the dominant public discourse. It follows that Ubuntu is not deployed in a legal vacuum and public officials need to demonstrate a clear understanding of the manner in which Ubuntu can strengthen and

¹²⁹ Praeg L *Report on Ubuntu* (2014) 155.

¹³⁰ Please see discussion regarding the minimum core obligation as advanced by Bilchitz at Section 3.5.

¹³¹ Please see discussion regarding the allocation and subsequent utilisation of scarce resources at Section 3.6.2.1.

¹³² Please recall the explanation tendered at Section 1.2.

colour our constitutional democracy through giving effect to key constitutional rights.

Praeg believes that urgent conceptual work is required in defining and shaping the contribution that Ubuntu could make in the political and philosophical spheres.¹³³ This is necessary in order to contemplate the possibility of a present-day political life which is in fact predicated upon the founding promise of a shared humanity.¹³⁴ Thus, one must acknowledge and explore the role of politics and power relations in shaping the meaning of Ubuntu in its present day setting.¹³⁵ I am in agreement with Praeg that 'the problem was never with Ubuntu, but with the politics of Ubuntu'.¹³⁶ Thus, Praeg believes that it is indeed possible (and I would submit essential) to reposition/reconfigure Ubuntu in a form of critical humanism that would 'always remain irreducible to the politics of the day'.¹³⁷

It is contended that the reduction of Ubuntu to a piecemeal concept of the apolitical (and at times the anti-political) points to a motive that is either naive or of a sinister turn.¹³⁸ Furthermore, it is lamentable that the underlying assumption of the postcolonial Ubuntu discourse, namely that it is a 'unique philosophy and a sign of African authenticity', has not been recognised.¹³⁹ This purported naivety can be overcome by being mindful of the fact that every discussion about Ubuntu is concerned with relations of power so as to secure the recognition of 'blackness, black values, traditions and concepts' as having 'equal value to the people for whom they matter'.¹⁴⁰

¹³³ Praeg L *Report on Ubuntu* (2014) 155.

¹³⁴ Praeg L *Report on Ubuntu* (2014) Preface.

¹³⁵ Praeg L *Report on Ubuntu* (2014) Preface. Please see Cornell D 'Exploring ubuntu-tentative reflections' available at www.fehe.org/index.php?id=281, (accessed 17 June 2016).

¹³⁶ Praeg L *Report on Ubuntu* (2014) Preface.

¹³⁷ Praeg L *Report on Ubuntu* (2014) Preface. Please see Molefe M 'A Report on Ubuntu' 2 *Acta Academica* (2014) 160.

¹³⁸ Praeg L *Report on Ubuntu* (2014) 14.

¹³⁹ Praeg L *Report on Ubuntu* (2014) 14. Please see Bohler-Müller N 'Ubuntu jurisprudence' (2012) 370.

¹⁴⁰ Praeg L *Report on Ubuntu* (2014) 14. Please see Molefe M 'A Report on Ubuntu' 2 *Acta Academica* (2014) 160.

It is of critical importance to embrace the fact that to mention that 'Africans have Ubuntu' is to acknowledge the inalienable right of Africans to not be consigned to the periphery but in fact to be an integral part of the conversation.¹⁴¹ It is indeed an inescapable conclusion that to speak about Ubuntu is a political act which aims to question power relations and representation.¹⁴² Thus, it is of the utmost importance to recognise the link between Ubuntu as a political act and how its content is constantly shaped by context.¹⁴³ Consequently, Ubuntu was viewed in the not too distant past (i.e. during the apartheid era) as being without value but it has been embraced in present times as depicting our shared humanity.¹⁴⁴ It is necessary for Ubuntu to be acknowledged as a political choice as it has elements of (benevolent) coercion which is the flip side of the well-known characteristics of Ubuntu (e.g. seemingly unlimited forgiveness as well as embracing reconciliation regardless of the cost) which normally takes pride of place in conventional Ubuntu discourse.¹⁴⁵

Furthermore, the 'sharing of resources' has been quarantined from the ordinary meaning assigned to Ubuntu by politicians in terms of which those same politicians view Ubuntu as only constituted by the 'sharing of obligations'.¹⁴⁶ This serves to highlight the lack of political will on the part of politicians to assume ultimate responsibility for the plight of vulnerable groups by preferring a specific (and distorted) understanding of the 'sharing of obligations'. It is submitted that a nuanced understanding of the 'sharing of obligations' would in fact include 'an appropriate sharing of resources' so as to give effect to an Ubuntu-inspired vision of a just and caring nation-state. It is further submitted that the aforementioned nuanced understanding of the 'sharing of

¹⁴¹ Praeg L *Report on Ubuntu* (2014) 15.

¹⁴² Praeg L *Report on Ubuntu* (2014) 15.

¹⁴³ Praeg L *Report on Ubuntu* (2014) 15. Please see Cornell D & van Marle K 'Exploring ubuntu' (2012) 362.

¹⁴⁴ Praeg L *Report on Ubuntu* (2014) 15.

¹⁴⁵ Praeg L *Report on Ubuntu* (2014) 15. Please see Molefe M 'A Report on Ubuntu' 2 *Acta Academica* (2014) 161.

¹⁴⁶ Praeg L *Report on Ubuntu* (2014) 67. Please see Zulu P *A Nation in Crisis* (2013) 30. Please also see Coertze RD 'Ubuntu and nation building' *South African Journal of Ethnology* 24(4) (2001) 115.

obligations' would ensure the prioritisation of state spending in order to give effect to critical socio-economic rights so as to ease the plight of vulnerable groups.

Praeg identifies 'benevolent coercion, indoctrination and inculcation' as indicative of the constitutive violence that is an integral component of Ubuntu.¹⁴⁷ Thus, there is a need to acknowledge the tension between Ubuntu theorists who seek to disregard the aforementioned constitutive violence aspect of Ubuntu as compared to African politicians who exploit that very aspect of Ubuntu to instil and promote discipline and/or forge coherent political formations.¹⁴⁸ Praeg believes that the anti-apartheid struggle was fashioned on a political praxis which was imbued with this same constitutive violence.¹⁴⁹ Consequently, Ubuntu should be embraced in its entirety by accepting both the extraordinary humanism and 'the often brutal nature of the technologies of discipline required for its manifestation'.¹⁵⁰ Thus, the aforementioned technologies of discipline are an integral component of modifying/shaping the behaviour of an individual so as to be viewed 'as being human, having ubuntu'.¹⁵¹

Praeg prefers to cast Ubuntu as critical humanism and seeks to emphasise that the word 'critical' refers to the dominant nature of the political in any given discussion.¹⁵² His views of critical humanism is different to that of mainstream Western humanism as his primary focus is not the human being as such but rather a clear focus on the workings of power that resulted in the exclusion of specific people from being viewed as human in the first place.¹⁵³ In this regard Ramose has stated that 'Africans are an injured and conquered people' and that this served as 'the pre-eminent starting-point of African philosophy in its proper and

¹⁴⁷ Praeg L *Report on Ubuntu* (2014) 65.

¹⁴⁸ Praeg L *Report on Ubuntu* (2014) 65.

¹⁴⁹ Praeg L *Report on Ubuntu* (2014) 65.

¹⁵⁰ Praeg L *Report on Ubuntu* (2014) 66. Please see Molefe M 'A Report on Ubuntu' 2 *Acta Academica* (2014) 161.

¹⁵¹ Praeg L *Report on Ubuntu* (2014) 66. Please see Molefe M 'A Report on Ubuntu' 2 *Acta Academica* (2014) 161. Please also see Cornell D 'Is there a difference' (2012) 236 as well as Cornell D & van Marle K 'Exploring ubuntu' (2012) 362.

¹⁵² Praeg L *Report on Ubuntu* (2014) 12.

¹⁵³ Praeg L *Report on Ubuntu* (2014) 12.

fundamental signification'.¹⁵⁴ Consequently, any attempt to delve into African philosophy or in any way explore Ubuntu is in fact a political question.¹⁵⁵ Thus, the critical importance of being ever mindful of the political dimension of Ubuntu is emphasised as a means to fashion a rational and logical framework in exploring and understanding the discourse on Ubuntu.¹⁵⁶

It is of pivotal importance to embrace the view that critical humanism is a mode of critique rather than an ideology.¹⁵⁷ Consequently, Praeg seeks to emphasise the lack of an 'ism' (or ideology) when referring to (critical) humanism as it is indeed more adequately defined in terms of continuous humanising acts.¹⁵⁸ Thus, one should dismiss 'the seductions of identity politics' and highlight that 'what is unique about Ubuntu is not any epistemological, ontological or even axiological specificity, but simply the fact of its being an actualised communitarian praxis of the humanising'.¹⁵⁹ This is a critical insight offered by Praeg as it serves to bolster my assertion that at the core of ubuntu (as a living praxis) is an unwavering devotion to give effect to communal obligations which is tantamount to giving effect to constant humanising acts. The specific focus on communal obligations (in this thesis) provides for a powerful synergy with the human rights regime in South Africa (as enshrined in the Constitution) in embracing the interconnectedness and interdependence of people living side by side as well as the manner in which civil, political and socio-economic rights manifest as both interconnected and interdependent.

Cornell believes that for Ubuntu to be properly considered is to contest the racist standpoint that Ubuntu, as an African belief, cannot make a meaningful contribution to a more nuanced understanding of morality

¹⁵⁴ Ramose MB 'African philosophy through ubuntu' (1999) 44.

¹⁵⁵ Praeg L *Report on Ubuntu* (2014) 12. Please see Cornell D & van Marle K 'Exploring ubuntu' (2012) 362.

¹⁵⁶ Praeg L *Report on Ubuntu* (2014) 12. Please see Cornell D & van Marle K 'Exploring ubuntu' (2012) 362.

¹⁵⁷ Praeg L *Report on Ubuntu* (2014) 19.

¹⁵⁸ Praeg L *Report on Ubuntu* (2014) 20.

¹⁵⁹ Praeg L *Report on Ubuntu* (2014) 20.

and law by virtue of its inherent vagueness and a plethora of ill-defined descriptions.¹⁶⁰ Furthermore, there is a need to avoid Ubuntu being utilised to enforce pervasive inequalities that are present in our society.¹⁶¹ Thus, Praeg rightfully contemplates whether we might be better served by shelving all talk of Ubuntu (and associated notions of social solidarity) until such time as the necessary political and economic changes have been ushered in so as to fashion a society in time in which talk of Ubuntu is synonymous with a proper distribution of resources.¹⁶²

The transformation of praxes into abstract forms has resulted in Praeg coining the phrase ‘the logic of interdependence’ to ensure that engaged scholars remain vigilant of the politics that are ever-present when praxis (i.e. ubuntu) is transformed into an abstract form (i.e. Ubuntu).¹⁶³ Thus, the logic of interdependence serves to cast light on ubuntu as praxis.¹⁶⁴ The ongoing disagreement about Ubuntu is premised on a crucial mistake on the part of theorists who fail to draw a distinction between ubuntu as praxis (as evidenced by a political economy of obligation in which ubuntu praxis is immersed) and the abstract articulation of Ubuntu (which is an expression of the aforementioned praxis but shorn of context).¹⁶⁵ To be described as one ‘who has ubuntu’ is clear recognition that you have embraced the logic of interdependence and that you have ‘lived as *belonging*’ which is characterised ‘in praxis or in the act of living the reality and actuality of that interdependence’.¹⁶⁶ Thus, Praeg believes that giving effect to the logic of interdependence is in turn premised on embracing a set of values.¹⁶⁷

¹⁶⁰ Cornell D ‘Subaltern Legality’ (2014) 170.

¹⁶¹ Praeg L *Report on Ubuntu* (2014) 18.

¹⁶² Praeg L *Report on Ubuntu* (2014) 18.

¹⁶³ Praeg L *Report on Ubuntu* (2014) 36. Please see Cornell D ‘Exploring ubuntu-tentative reflections’ available at www.fehe.org/index.php?id=281, (accessed 17 June 2016).

¹⁶⁴ Praeg L *Report on Ubuntu* (2014) 36.

¹⁶⁵ Praeg L *Report on Ubuntu* (2014) 36. Please see Molefe M ‘A Report on Ubuntu’ 2 *Acta Academica* (2014) 161.

¹⁶⁶ Praeg L *Report on Ubuntu* (2014) 45.

¹⁶⁷ Praeg L *Report on Ubuntu* (2014) 45.

In addition, it is necessary to trace the manner in which political considerations have shaped the present day meaning and understanding of Ubuntu.¹⁶⁸ Consequently, the manner in which ubuntu has been cleaved from a specific cultural praxis (and subsequently reshaped so as to allow Ubuntu to be portrayed as being culturally significant for each and every one) should be acknowledged.¹⁶⁹ The critical implication being that Ubuntu theorists (assembled as a collective) can claim that Ubuntu can serve to forge unity on a scale that far exceeds the original territory which was shaped by the initial reach of the political economy of obligation.¹⁷⁰ It is submitted that this all-encompassing community/nation-state (with its attendant communal obligations) is in fact a central premise of my thesis. Consequently, the aforementioned beliefs (as proffered by Praeg) are shaped by two assumptions: Ubuntu can be fashioned by distilling the values with which ubuntu praxis is imbued and that Ubuntu so forged is distinctive enough to be instantly recognisable as African yet general enough to be embraced by all in a manner in which its reach extends beyond its originating values.¹⁷¹

It should be noted that ubuntu as praxis is more focussed on sharing humanity rather than seeking to dissect the innermost meaning of sharing.¹⁷² This in turn casts light on the lack of awareness in terms of which the present day South African government has structured thinking 'between the priority of political freedom (first transition) and the realisation of material conditions for the meaningful exercise of that freedom (second transition)'.¹⁷³

¹⁶⁸ Praeg L *Report on Ubuntu* (2014) 46.

¹⁶⁹ Praeg L *Report on Ubuntu* (2014) 46.

¹⁷⁰ Praeg L *Report on Ubuntu* (2014) 46. Please see Molefe M 'A Report on Ubuntu' 2 *Acta Academica* (2014) 162. Please also see Coertze RD 'Ubuntu and nation building' *South African Journal of Ethnology* 24(4) (2001) 115.

¹⁷¹ Praeg L *Report on Ubuntu* (2014) 46. Please see Molefe M 'A Report on Ubuntu' 2 *Acta Academica* (2014) 162.

¹⁷² Praeg L *Report on Ubuntu* (2014) 40.

¹⁷³ Praeg L *Report on Ubuntu* (2014) 68.

The view of Ubuntu as espousing forgiveness that knows no boundaries would decimate the actual content of Ubuntu as it is submitted that 'the inhumane and the unforgivable are necessary limits that make humanism and forgiveness possible'.¹⁷⁴ This aforementioned view is further advanced by emphasising that the existence of an outer limit for forgiveness implies the presence of violence (at those outer limits) in the form of policing, benevolent control and coercion.¹⁷⁵ This outer limit also serves to make it possible to forge a community and fashion a sense of belonging (with clearly defined limits).¹⁷⁶ In addition, one should firmly reject the sentimentalising of Ubuntu so as to ensure that Ubuntu can be utilised to demonstrate what is humane and in effect define the outer limits of what can be defined as humane.¹⁷⁷ The previous discussion with regards to accessing and maintaining membership of a community will be explored in due course from an anthropological perspective.¹⁷⁸ Consequently, the aforementioned community contemplates the point of no return/the outer limit of belonging as related to an errant member in continuing to be regarded as a member of that community.¹⁷⁹

It is submitted that ubuntu (as a living praxis) can play a pivotal role in the promotion of accountability amongst public officials and state institutions (as well as give effect to social solidarity). However, it is critical to understand the political landscape within which 'ubuntu' or 'Ubuntu' is deployed so as to ensure that diligent and committed public officials can interrogate as well as shape contemporary public discourse. This will ensure that those same public officials can harness the full potential of the interplay between 'ubuntu' and 'Ubuntu' in colouring overarching political accountability as well as informing sustainable social solidarity ideals.

¹⁷⁴ Praeg L *Report on Ubuntu* (2014) 24. Please see Cornell D & van Marle K 'Exploring ubuntu' (2012) 362.

¹⁷⁵ Praeg L *Report on Ubuntu* (2014) 24. Please see Molefe M 'A Report on Ubuntu' 2 *Acta Academica* (2014) 161.

¹⁷⁶ Praeg L *Report on Ubuntu* (2014) 25.

¹⁷⁷ Praeg L *Report on Ubuntu* (2014) 25.

¹⁷⁸ Please see Sections 4.1 and 4.2.

¹⁷⁹ Praeg L *Report on Ubuntu* (2014) 203.

2.5 An exploration of the attributes of communitarianism as encompassed by ubuntu

It is of paramount importance to critically explore communitarianism so as to ensure that ubuntu (which incorporates communitarian ideals) is neither diluted nor shackled by distorted and one-dimensional 'insights' (as detailed below) of the meaning and potential of communitarianism.

It is important to recognise that a standing criticism of ubuntu (styled as African Communitarianism) by liberals is that of the inherent violence or coercion in all forms of communitarianism.¹⁸⁰ Praeg argues for the need to carefully frame the aforementioned concept of violence as there is a need to address the myopic debate between the assumed stark differences between liberalism and communitarianism.¹⁸¹ In this regard there is a failure (as a rule) to admit the links between individuals in liberal circles by virtue of a clearly defined tradition/history and the inevitable community associated with it.¹⁸²

The communal obligations' focus of ubuntu has been emphasised in this thesis but this does not imply the shunning of individualism. It is submitted that ubuntu so defined can in fact mesh with a human rights regime as enshrined in the Constitution. This is in keeping with the sentiments of Nkrumah who stated that:

'...what socialist thought in Africa must recapture is not the structure of the "traditional African society" but its spirit, for the spirit of communalism is crystallised in its humanism and in its reconciliation of individual advancement with group welfare'.¹⁸³

The aforementioned insight by Nkrumah is of critical importance in highlighting the manner in which an individual human rights regime (such as enshrined in the Constitution) can indeed mesh with the communal obligations' focus of ubuntu. Furthermore, the illuminating insight offered by Nkrumah resonates with my belief in the manner in which the

¹⁸⁰ Praeg L *Report on Ubuntu* (2014) 22.

¹⁸¹ Praeg L *Report on Ubuntu* (2014) 23.

¹⁸² Praeg L *Report on Ubuntu* (2014) 23.

¹⁸³ Nkrumah K 'African socialism revisited' *Revolutionary Path* 438-445 (1972) 441.

utilisation of ubuntu (in a contemporary context) can make a compelling contribution in safeguarding and advancing the key needs of vulnerable groups whilst providing a platform for individuals to live lives of purpose.

It is believed that the unequal power relations between the West and postcolonial African societies will inevitably lead to ubuntu being positioned as a form of African humanism and/or as African communitarianism.¹⁸⁴ Thus, it is of the utmost importance to avoid the trap of being seduced by the simplistic notion of African communitarianism versus Western individualism in which ubuntu could serve as the embodiment of communitarianism and/or the need to augment the individualistic narrative.¹⁸⁵ It should be noted that what is in fact required is embracing the manner in which ubuntu could in fact strengthen and deepen our understanding of both communitarian and individualistic approaches by shedding light on the 'interplay between rights and obligations' as experienced by individuals in contemporary society.¹⁸⁶ It is (correctly) asserted that the perceived contribution that ubuntu could make in contemporary times is shaped by the central idea that 'the membership of imagined communities entails duties and obligations'.¹⁸⁷

Ubuntu offers one the vantage point in which the community (in its most basic form) cannot be viewed as 'one on one correspondence between rights and duty, because I am not at all a person without this community'.¹⁸⁸ Thus, one should proceed with caution when labelling ubuntu as an expression of communitarianism as it gives rise to a specific understanding of the constitutive violence of ubuntu.¹⁸⁹ However, it is important to bear in mind that constitutive violence is an integral part of ubuntu and this serves to highlight the manner in which the persistent 'sentimentalising of ubuntu' has robbed it of specific

¹⁸⁴ Praeg L *Report on Ubuntu* (2014) 23.

¹⁸⁵ Praeg L *Report on Ubuntu* (2014) 54.

¹⁸⁶ Praeg L *Report on Ubuntu* (2014) 54.

¹⁸⁷ Praeg L *Report on Ubuntu* (2014) 54.

¹⁸⁸ Cornell D 'A Call for a Nuanced Constitutional Jurisprudence' (2012) 327.

¹⁸⁹ Praeg L *Report on Ubuntu* (2014) 23.

content and emancipatory potential.¹⁹⁰ In addition, it is important to define what is humane (in terms of an outer limit as previously discussed) as the constitutive violence can then be embraced as a political choice where the protection of individual rights does not prove adequate in addressing a demonstrated need.¹⁹¹

There are indeed pitfalls in adopting an approach where ubuntu is routinely utilised as a social standard to espouse communitarian ideals at the expense of individual rights.¹⁹² This is viewed as contradictory and suggestive of a normative consensus that is difficult to demonstrate in a country (such as South Africa) which has strong pluralistic tendencies.¹⁹³ However, it is necessary to emphasise that ubuntu could play a critical role in giving effect to the rights and aspirational ideals enshrined in the Constitution. Nonetheless, individualism is favoured in the present day constitutional democracy in South Africa (as compared to altruism) and this is deemed to be in large part due to the effects of colonialism.¹⁹⁴ Thus, all customs and practices that resonate with altruistic notions are cast to the periphery as a rule.¹⁹⁵ However, it is submitted that an enlightened understanding of ubuntu is critical in shaping bold and innovative jurisprudence. This in turn will promote a cohesive national identity by prioritising the realisation of the rights of vulnerable groups as a means of giving expression to critical altruistic notions whilst safeguarding key individual rights.

2.6 An analysis of case law pertaining to key aspects of ubuntu

Only specific aspects of pertinent cases will be analysed in order to maintain a clear focus on the key aspects of ubuntu as advanced in this

¹⁹⁰ Praeg L *Report on Ubuntu* (2014) 24. Please see Molefe M 'A Report on Ubuntu' 2 *Acta Academica* (2014) 161. Please also see Cornell D 'Exploring ubuntu-tentative reflections' available at www.fehe.org/index.php?id=281, (accessed 17 June 2016).

¹⁹¹ Praeg L *Report on Ubuntu* (2014) 26. Please see Molefe M 'A Report on Ubuntu' 2 *Acta Academica* (2014) 161.

¹⁹² Praeg L *Report on Ubuntu* (2014) 28.

¹⁹³ Praeg L *Report on Ubuntu* (2014) 28.

¹⁹⁴ Praeg L *Report on Ubuntu* (2014) 239.

¹⁹⁵ Praeg L *Report on Ubuntu* (2014) 239.

thesis. It is submitted that the status of ubuntu was unclear at the advent of the constitutional dispensation in South Africa as the Interim Constitution¹⁹⁶ provided for ubuntu in the specific context of the formation of the Truth and Reconciliation Commission whilst the Final Constitution made no reference to ubuntu.¹⁹⁷ Thus, there was a lack of clarity as to whether the remit of ubuntu extended beyond issues of political reconciliation as detailed in the Interim Constitution.¹⁹⁸

The Court reached a unanimous verdict in *Makwanyane* as to the unconstitutionality of the death sentence in that it was deemed to be at odds with the core values of ubuntu.¹⁹⁹ Furman noted that even though a number of the presiding judges specifically mentioned ubuntu this did not detract from the fact that it was only one of a multitude of cogent reasons advanced for the prohibition against the continued utilisation of the death penalty.²⁰⁰ Furman believes that the Constitutional Court 'could have and would have' reached the same decision without utilising ubuntu.²⁰¹ The commentary by Van der Walt (that talk of ubuntu was merely *obiter dicta*) is worth considering (at the very least) as he believes that the Constitutional Court (with specific reference to the judgment delivered by Chaskalson P) was struck by the disproportionate nature of the death penalty as a fitting form of punishment when an alternative (as well as effective) penalty, in the form of life imprisonment, could be instituted.²⁰²

Chaskalson P utilises ubuntu to counter retribution with the latter concept counting only as one of the elements considered in determining the proportionality test.²⁰³ Furthermore, Chaskalson P refers to the adoption

¹⁹⁶ Constitution of the Republic of South Africa, Act 200 of 1993.

¹⁹⁷ Furman K 'Ubuntu and the law: some lessons for the practical application of ubuntu' in Praeg L & Magadla S (eds) *Ubuntu: Curating the Archive* (2014) 151 (hereafter *Ubuntu and the law*).

¹⁹⁸ Furman K 'Ubuntu and the law' (2014) 151.

¹⁹⁹ *Makwanyane* (1995) para 151.

²⁰⁰ Furman K 'Ubuntu and the law' (2014) 151.

²⁰¹ Furman K 'Ubuntu and the law' (2014) 151.

²⁰² Furman K 'Ubuntu and the law' (2014) 151.

²⁰³ *Makwanyane* (1995) para 131.

of the Constitution in building a secure future for all South Africans and refers to the envisaged role for ubuntu as follows:

‘Although this commitment has its primary application in the field of political reconciliation, it is not without relevance to the enquiry we are called upon to undertake in the present case. To be consistent with the value of ubuntu ours should be a society that ‘wishes to prevent crime... [not] to get even with them’.²⁰⁴

Thus, Furman rightfully believes that the utilisation and deployment of ubuntu was not at the core of the reasoning employed by the Constitutional Court in reaching its decision in the aforementioned case.²⁰⁵

In *AZAPO and Others v The President of the Republic of South Africa and Others* (‘AZAPO’) the constitutionality of section 20(7) of the Promotion of National Unity and Reconciliation Act 34 of 1995 was challenged.²⁰⁶ The aforementioned Act established the Truth and Reconciliation Commission and section 20(7) of that same Act authorised a conditional grant of amnesty to an applicant that had made a full disclosure of any act undertaken in the apartheid era to further a political aim.²⁰⁷ The applicants contended that section 27 prevented the right to a fair trial as guaranteed by section 22 of the Interim Constitution.²⁰⁸ The *AZAPO* case was of critical importance as the Constitutional Court held that the epilogue (in which ubuntu had been included) had a status equal to all other parts/constitutional provisions in the Interim Constitution.²⁰⁹

The temporary suspension of the individual right to justice in the *AZAPO* case was predicated on a belief that only an absolute assurance of amnesty would facilitate a process that would recognise the agony of

²⁰⁴ *Makwanyane* (1995) para 130 - 131.

²⁰⁵ Furman K ‘Ubuntu and the law’ (2014) 153.

²⁰⁶ *AZAPO v President of the Republic of South Africa* 1996 4 SA 671 (CC) (hereafter *AZAPO*) para 8.

²⁰⁷ *AZAPO* (1996) para 4.

²⁰⁸ *AZAPO* (1996) para 33.

²⁰⁹ *AZAPO* (1996) para 14.

past suffering whilst providing the victims of apartheid the 'collective recognition of a new nation'.²¹⁰ Thus, Praeg explores the manner in which the temporary suspension of an individual right (to justice) was required to forge the collective identity of 'We' as a means to secure the future enjoyment of individual rights.²¹¹ Praeg draws attention to the manner in which the suspension of the aforementioned individual right is counterbalanced by the need to advance a collective ideal.²¹² The aforementioned insight offered by Praeg serves to highlight the manner in which ubuntu could be utilised to ensure that the key needs of the vulnerable groups are not cast to the periphery and in time shape opportunities for members of those vulnerable groups to live lives of purpose. It is submitted that providing for the basic needs of vulnerable groups (as well as facilitating life-changing opportunities for individuals at the same time) will forge social solidarity in the time to come.

In conclusion, Cornell and Muvangua offer a critical insight in emphasising the need to 're-cognise ubuntu (due to it not being mentioned in the [Final] Constitution of South Africa) as a grounding ideal and justiciable principle in light of the fact that it remained the pivotal value of the majority of the people and its continued use at all levels of the judiciary'.²¹³ The aforementioned observation by Cornell and Muvangua is extremely important as it serves to highlight how the utilisation of ubuntu in our constitutional democracy will promote inclusivity in that the majority of people are more likely to make sense of (as well as engage with) an individual rights regime that does not shun communal obligations.

²¹⁰ AZAPO (1996) para 17.

²¹¹ Praeg L *Report on Ubuntu* (2014) 269.

²¹² Praeg L *Report on Ubuntu* (2014) 269.

²¹³ Cornell D & Muvangua N 'Ubuntu and the law: African ideals and post-apartheid jurisprudence' (2012) 14.

2.7 Criticisms of ubuntu as an ideal and/or a value

2.7.1 Introduction

Ubuntu is deemed by critics to be too vague to serve any useful purpose.²¹⁴ However, Bennett unequivocally refutes this as he believes that ubuntu, as a metanorm, is out of necessity generalised in nature.²¹⁵ Bennett believes that ubuntu could be viewed as a value or as a 'representation of the right way of living'.²¹⁶

A thought-provoking criticism of ubuntu is the manner in which the judiciary has utilised ubuntu to portray culture as homogenous and served to silence opinions and stifle debate.²¹⁷ In addition, Cornell has stated that commonplace criticisms of ubuntu include that ubuntu is a communal ethic which undermines individual autonomy by stressing the importance of duties owed to the group.²¹⁸ Also, ubuntu is viewed as conservative due to supposedly supporting patriarchal and authoritarian agendas.²¹⁹ Cornell engages with the abovementioned criticisms by highlighting that those same criticisms reflect a critical lack of insight as ubuntu cannot be reduced to 'an ethical ontology of a shared world' as ubuntu requires the active participation of all individuals to realise the ethical demand to bring about a humane world.²²⁰ Thus, she views the abovementioned criticisms as failing to accept the 'aspirational and ideal edge' of ubuntu.²²¹

²¹⁴ Please see Kroeze IJ 'Doing things with values: the case of ubuntu' 2 (2002) *Stellenbosch Law Review* 252(hereafter Doing things with values). Please also see Keevy I 'Ubuntu Versus the Core Values of the South African Constitution' in Praeg L & Magadla S (eds) *Ubuntu: Curating the Archive* (2014) (hereafter Ubuntu versus the core values).

²¹⁵ Bennett T 'Ubuntu' (2011) 14 *PELJ* 46.

²¹⁶ Bennett T 'Ubuntu' (2011) 14 *PELJ* 46.

²¹⁷ Cornell D 'Exploring ubuntu-tentative reflections' available at www.fehe.org/index.php?id=281, (accessed 17 June 2016).

²¹⁸ Cornell D 'Exploring ubuntu-tentative reflections' available at www.fehe.org/index.php?id=281, (accessed 17 June 2016).

²¹⁹ Cornell D 'Exploring ubuntu-tentative reflections' available at www.fehe.org/index.php?id=281, (accessed 17 June 2016).

²²⁰ Cornell D 'Exploring ubuntu-tentative reflections' available at www.fehe.org/index.php?id=281, (accessed 17 June 2016).

²²¹ Cornell D 'Exploring ubuntu-tentative reflections' available at www.fehe.org/index.php?id=281, (accessed 17 June 2016).

I am in firm agreement with the abovementioned views of Cornell as the discussion to follow readily demonstrates that general criticisms of ubuntu are as a rule one-dimensional and can be easily picked apart. That is, if the starting point is one of showcasing the manner in which ubuntu (defined in a contemporary context as promoting the primacy of communal obligations) is in fact capable of meshing with an individual human rights regime.

2.7.2 The purported lack of definition, inherent vagueness and vacuous nature of ubuntu

Praeg explores the concept of 'ubuntu exceptionalism' by referring to the manner in which an ill-conceived idea has taken hold regarding the near magical qualities of ubuntu and how it is defined by a humanism that knows no bounds.²²² Thus, Praeg laments the fact that a flawed discourse about the nature of ubuntu has sullied the endearing message of ubuntu in celebrating our shared humanity.²²³ In a related manner, he offers harsh criticism of present day racism couched as a legal demand for a detailed definition of ubuntu prior to it being utilised in law.²²⁴ It is my firm contention that a complete definition of ubuntu is not required prior to its utilisation. However, it is necessary to strip away vacuous claims while promoting accurate, uncontested insights as related to ubuntu (i.e. the communal obligations' focus of ubuntu as well as the ever-present constitutive violence so as to develop a nuanced understanding of ubuntu.)

Cornell notes that sceptics of ubuntu had viewed it 'as an empty signifier that has been cynically deployed by its proponents to promote and thus capture young black South Africans in the commercialism and consumerism of advanced global capitalism'.²²⁵ Cornell rightfully questions the accuracy of the aforementioned criticism as ubuntu is used

²²² Praeg L *Report on Ubuntu* (2014) 217.

²²³ Praeg L *Report on Ubuntu* (2014) 220.

²²⁴ Praeg L *Report on Ubuntu* (2014) 239.

²²⁵ Cornell D 'Exploring ubuntu-tentative reflections' available at www.fehe.org/index.php?id=281, (accessed 17 June 2016).

widely in South Africa and at the very least has 'political and ethical potency' as previously detailed.²²⁶ Ultimately, Cornell states that her tentative investigations have highlighted the central role that ubuntu plays in shaping ethics and politics through serving as the focal point of reference in how those interviewed thought of themselves and their perceived obligations to the new South Africa.²²⁷

The sustained criticism of ubuntu in that 'we cannot invoke what we cannot define' is noted and will be comprehensively addressed in the text to follow.²²⁸ In this regard Derrida highlights the concept of 'transcendental violence' which is depicted as the inevitable violence visited upon the particularity of a concept (in this case ubuntu) as a means to engage in conversation/debate about that specific concept.²²⁹ Furthermore, 'epistemological genocide' is deemed to be exerted upon all African concepts when interpreted through Western philosophies.²³⁰ Also, the concept of 'extrapolated approximation' is explored in which ubuntu is equated to another concept and/or viewed as an expression of another concept which in no way defines ubuntu itself and instead feeds into the sustained criticism that ubuntu is not capable of being defined.²³¹

Bennett refers to the positioning of ubuntu as a loanword (in the English language) which is aptly described as being 'highly susceptible to change, not only because it is novel, but also because it is isolated. Its links with the language from which it was borrowed are broken, and it has no semantic connections with other words in the language into which it has been absorbed'.²³² Thus, the loanword would need to find a way to stake its claim (for want of a better turn of phrase) alongside established legal terms.²³³ Furthermore, Bennett raises the concern that

²²⁶ Cornell D 'Exploring ubuntu-tentative reflections' available at www.fehe.org/index.php?id=281 (accessed 17 June 2016).

²²⁷ Cornell D 'Exploring ubuntu-tentative reflections' available at www.fehe.org/index.php?id=281 (accessed 17 June 2016).

²²⁸ Praeg L *Report on Ubuntu* (2014) 264.

²²⁹ Derrida J 'Writing and difference' (1981).

²³⁰ Praeg L *Report on Ubuntu* (2014) 265.

²³¹ Praeg L *Report on Ubuntu* (2014) 265.

²³² Bennett T 'Ubuntu' (2011) 14 *PELJ* 31.

²³³ Bennett T 'Ubuntu' (2011) 14 *PELJ* 31.

such a loanword would inevitably 'be exploited by a range of new users to serve ends of their own'.²³⁴

However, Himonga, Taylor and Pope believe that ubuntu (as a concept) is not negatively affected by virtue of being debated/explored in a foreign language.²³⁵ The aforementioned authors offer a compelling insight in highlighting that if ubuntu is to drive transformation (in South Africa) then it must be capable of being discussed and understood in what could be viewed as 'foreign languages' (i.e. English and Afrikaans).²³⁶ Nonetheless, Bennett offers an interesting insight by cautioning against seeking to define ubuntu and/or outlining its specific 'area of operation' too soon as it is at present being interrogated and shaped by the courts, legislature and legal scholars and could yield a novel set of values and principles for law in time to come.²³⁷

Kroeze has been at the forefront of emphasising the 'rhetorical strategies' that were on display in the *Makwanyane* judgment which she believed had bedevilled the future invocation of ubuntu in the adjudication of legal matters.²³⁸ Kroeze attributed the deployment of three rhetorical strategies (in the abovementioned court case) to the pervasive influence of legal formalism in the deliberation of constitutional matters.²³⁹ She criticised the court for stating that 'the values of ubuntu are no different from those found in any other civilised society or legal system' which called into question the need for ubuntu to be applied at all.²⁴⁰ Kroeze also criticised the manner in which a variety of concepts were used to define ubuntu which rendered it indescribably vague and led to a 'concept that simply collapses under the weight of the expectations'.²⁴¹ Finally, Kroeze highlighted the final rhetorical move deployed by the court in positioning ubuntu as diametrically opposed to

²³⁴ Bennett T 'Ubuntu' (2011) 14 *PELJ* 31.

²³⁵ Himonga, Taylor & Pope 'Reflections' (2013) *PELJ* 377.

²³⁶ Himonga, Taylor & Pope 'Reflections' (2013) *PELJ* 377.

²³⁷ Bennett T 'Ubuntu' (2011) 14 *PELJ* 52.

²³⁸ Kroeze IJ 'Doing things with values' *Stellenbosch Law Review* 2 (2002) 252.

²³⁹ Kroeze IJ 'Doing things with values' 2 (2002) *Stellenbosch Law Review* 252.

²⁴⁰ Kroeze IJ 'Doing things with values' 2 (2002) *Stellenbosch Law Review* 252.

²⁴¹ Kroeze IJ 'Doing things with values' 2 (2002) *Stellenbosch Law Review* 252.

liberalism in which if liberalism is portrayed as advancing individual rights then ubuntu is inevitably positioned as embracing collective rights.²⁴² Consequently, Kroeze believed that ubuntu was confined to a debate characterised by 'liberalist dichotomies and hierarchies'.²⁴³

Praeg referred to the three 'rhetorical strategies' identified by Kroeze as that of equivocation, generalisation and juxtapositioning and felt that the aforementioned 'rhetorical moves' were not confined to legal formalism as such but in fact shadowed the debate on ubuntu.²⁴⁴ In this regard equivocation seeks to dismiss the need for a concept to be critically explored by emphasising that the concept in question has no telling nor novel insights to offer.²⁴⁵ In addition, generalisation is deemed to be an especially destructive mechanism in seeking to strip ubuntu of its 'constitutive violence and counter-hegemonic' demand for a multi-faceted understanding of justice which would enable the collective will to trump individual rights in appropriate circumstances.²⁴⁶ Juxtapositioning seeks to render ubuntu impotent by portraying anything with an altruistic edge as belonging to a troublesome African axiomatic and thus inevitably incompatible with an individual regime of rights.²⁴⁷ However, it is my contention that ubuntu (as per the communal obligations' focus advanced in this thesis) is in fact compatible with a human rights regime in seeking to give effect to (as well as bolster) the realisation of aspirational values and socio-economic rights in order to create a sanctuary for all.

Van der Walt believes that the utilisation of ubuntu in law is problematic for three distinct reasons as follows: 'a lack of conceptual clarity, a lack of African particularity and a lack of appropriate cultural context when making use of ubuntu in the law'.²⁴⁸ He argues that concepts should be

²⁴² Kroeze IJ 'Doing things with values' 2 (2002) *Stellenbosch Law Review* 252.

²⁴³ Kroeze IJ 'Doing things with values' 2 (2002) *Stellenbosch Law Review* 252.

²⁴⁴ Praeg L *Report on Ubuntu* (2014) 266.

²⁴⁵ Praeg L *Report on Ubuntu* (2014) 267.

²⁴⁶ Praeg L *Report on Ubuntu* (2014) 267.

²⁴⁷ Praeg L *Report on Ubuntu* (2014) 267.

²⁴⁸ Van der Walt J 'Law and sacrifice: towards a post-apartheid theory of law' (2005) 111 (hereafter *Law and sacrifice*).

clearly defined prior to being utilised in the law/legal reasoning.²⁴⁹ Van der Walt questions the need to utilise ubuntu as he believes that it does not contribute anything uniquely African to jurisprudence.²⁵⁰ Furman offers an insightful and decisive rebuttal to the aforementioned criticism by Van der Walt by emphasising that politics (rather than an insistence upon distinct epistemological themes) should feature prominently in selecting appropriate mechanisms (which resonate with the lived experience of the people) in governing a society.²⁵¹

It is fair comment that ubuntu is being utilised so as to give effect to 'something distinctively African'.²⁵² Bennett cites with approval the views advanced by Keep and Midgley²⁵³ in seeking to incorporate something uniquely African 'into the legal system so as to form a cohesive, plural, South African legal culture'.²⁵⁴ It should be noted that the aforementioned legal culture will be coloured by concepts such as 'reconciliation, sharing, compassion, civility, responsibility, trust and harmony'.²⁵⁵ In this regard Keep and Midgley believe that it is indeed possible in part to achieve a pluralist legal culture as there is significant overlap between the values as encompassed by Western models of human rights and those values that are synonymous with ubuntu.²⁵⁶

Keep and Midgley have embraced a 'teleological' approach in engaging with values so as to maintain an unwavering focus on what the specific value could ultimately achieve as a means to facilitate the process of harmonisation.²⁵⁷ In addition, the Constitutional Court has routinely highlighted the overlap between ubuntu, entrenched rights in the Constitution and 'emerging international legal norms'.²⁵⁸ The application of the concept of ubuntu by the judiciary has thus served to highlight the

²⁴⁹ Van der Walt J 'Law and sacrifice' (2005) 111.

²⁵⁰ Van der Walt J 'Law and sacrifice' (2005) 111.

²⁵¹ Furman K 'Ubuntu and the law' (2014) 157.

²⁵² Bennett T 'Ubuntu' (2011) 14 *PELJ* 53.

²⁵³ Keep H & Midgley R 'Emerging role' (2007) 30.

²⁵⁴ Bennett T 'Ubuntu' (2011) 14 *PELJ* 53.

²⁵⁵ Bennett T 'Ubuntu' (2011) 14 *PELJ* 53.

²⁵⁶ Keep H & Midgley R 'Emerging role' (2007) 30.

²⁵⁷ Keep H & Midgley R 'Emerging role' (2007) 48.

²⁵⁸ Himonga, Taylor & Pope 'Reflections' (2013) *PELJ* 375.

ties between ubuntu and restorative justice.²⁵⁹ It follows that the utilisation of ubuntu (in very different areas of law such as criminal law, defamation law and eviction matters) can be explained through the quest to give effect to restorative justice ideals.²⁶⁰

It should be noted that ubuntu, whether defined as a value or legal norm, is in no way a 'technocratic concept'.²⁶¹ It should further be noted that attempts to strictly define and/or box ubuntu are ill-informed.²⁶² In this regard a nuanced understanding of ubuntu requires 'wisdom and open-mindedness'.²⁶³ However, this does not mean that ubuntu is not capable of being defined nor that it 'has a mercurial nature that changes according to its context'.²⁶⁴ In this regard Himonga, Taylor and Pope believe that ubuntu can be favourably compared with 'humanity in its diversity' in casting light on the need for humanity to be displayed through a celebration of diversity.²⁶⁵

In addition, Van der Walt is critical of the judgment delivered in *Makwanyane* as he believes that the Constitutional Court had failed to ascertain whether traditional communities believed the death penalty to be a suitable punishment in the event that specific crimes are perpetrated.²⁶⁶ Furman systematically dismantled the aforementioned criticism by noting that a person believing in both ubuntu and the death penalty did not make the aforementioned concepts 'conceptually compatible' and one would be well wide of the mark if one believed that people only ever held 'conceptually compatible' beliefs.²⁶⁷ Furthermore, the suggestion that ubuntu could not be applied outside of its cultural context was robustly dealt with by Furman who highlighted that customary law was by its very nature 'an evolving tradition' and that 'all

²⁵⁹ Himonga, Taylor & Pope 'Reflections' (2013) *PELJ* 376.

²⁶⁰ Himonga, Taylor & Pope 'Reflections' (2013) *PELJ* 376.

²⁶¹ Himonga, Taylor & Pope 'Reflections' (2013) *PELJ* 376.

²⁶² Himonga, Taylor & Pope 'Reflections' (2013) *PELJ* 376.

²⁶³ Himonga, Taylor & Pope 'Reflections' (2013) *PELJ* 376.

²⁶⁴ Himonga, Taylor & Pope 'Reflections' (2013) *PELJ* 376. Please see Bennett T 'Ubuntu' (2011) 14 *PELJ* 46.

²⁶⁵ Himonga, Taylor & Pope 'Reflections' (2013) *PELJ* 376.

²⁶⁶ Furman K 'Ubuntu and the law' (2014) 158.

²⁶⁷ Furman K 'Ubuntu and the law' (2014) 158.

traditions are perpetual reinventions'.²⁶⁸ Thus, she is correct to conclude that the abovementioned criticisms of Van der Walt are 'both limiting and limited'.²⁶⁹

Bennett notes that a further criticism of ubuntu is redundancy.²⁷⁰ He observes that the Constitutional Court has on a number of occasions dealt with ubuntu and dignity as if they are largely similar in nature and content.²⁷¹ In this regard it was stated in *Makwanyane* that:

'an outstanding feature of ubuntu in a community sense is the value it puts on life and human dignity. The dominant feature of the culture is that the life of another person is at least as valuable as one's own. Respect for the dignity of every person is integral to this concept. During violent conflicts and when violent crime is rife, distraught members of society decry the loss of ubuntu. Thus heinous crimes are the antithesis of ubuntu. Treatment that is cruel, inhuman or degrading is bereft of ubuntu'.²⁷²

However, it should be noted that any attempt to suggest that ubuntu and dignity are one and the same should be resisted.²⁷³ Bennett believes that 'the Western conception of dignity envisages the individual as the right-bearer, whereas ubuntu sees the individual as embedded in a community'.²⁷⁴ However, English believes ubuntu to be ambiguous in that it compels one to select between conflicting interpretations of ubuntu.²⁷⁵ Consequently, English states that ubuntu cannot be defined as both 'individual human dignity' and 'conformity to basic norms and collective unity' at the same time.²⁷⁶ However, there is no persuasive reasoning advanced by English to highlight why one should have to choose between the aforementioned versions (which are clearly different

²⁶⁸ Furman K 'Ubuntu and the law' (2014) 158.

²⁶⁹ Furman K 'Ubuntu and the law' (2014) 158.

²⁷⁰ Bennett T 'Ubuntu' (2011) 14 *PELJ* 47.

²⁷¹ Bennett T 'Ubuntu' (2011) 14 *PELJ* 47.

²⁷² *Makwanyane* (1995) para 225.

²⁷³ Bennett T 'Ubuntu' (2011) 14 *PELJ* 48.

²⁷⁴ Bennett T 'Ubuntu' (2011) 14 *PELJ* 48.

²⁷⁵ English R 'Ubuntu: the quest for an indigenous jurisprudence' (1996) *SAJHR* 645.

²⁷⁶ English R 'Ubuntu: the quest for an indigenous jurisprudence' (1996) *SAJHR* 645.

in nature) in furnishing ubuntu with meaning.²⁷⁷ Furthermore, it should be noted that there is nothing peculiar about a normative concept like ubuntu giving effect to various values at the same time.²⁷⁸

Furthermore, it is not viewed as problematic to position ubuntu as signifying communal morality even though this would entail 'co-responsibility, social justice, compassion, love and sharing' as a matter of course.²⁷⁹ It is critical to note that abstract concepts may be difficult to define but this should not be equated with those same concepts being treated as empty.²⁸⁰ However, it is of pivotal importance that a legal concept is not open-ended to the extent 'that it can be exploited to serve any conceivable purpose'.²⁸¹ Thus, a normative legal notion should be defined with sufficient specificity so as to ensure that different judges utilise the concept in a similar/predictable fashion.²⁸²

Praeg believes that the utilisation of ubuntu is required to attain the goals of the Constitution as ubuntu provides a nuanced understanding of personhood (which is different to that offered by Western jurisprudence) and that contradictions (which are deemed to be part and parcel of the law) are easier to contend with in an 'ubuntu-infused jurisprudence'.²⁸³

It is submitted that ubuntu is defined with the necessary precision to be utilised in a constitutional democracy in a contemporary context. In this regard the communal obligations' focus of ubuntu (as favoured in this thesis) serves to demonstrate the clarity with which ubuntu is imbued. Furthermore, it is critical to bear in mind that the deployment of ubuntu should be welcomed in light of its widespread use amongst the majority of people in South Africa.

²⁷⁷ Himonga, Taylor & Pope 'Reflections' (2013) *PELJ* 385.

²⁷⁸ Himonga, Taylor & Pope 'Reflections' (2013) *PELJ* 385.

²⁷⁹ Himonga, Taylor & Pope 'Reflections' (2013) *PELJ* 386.

²⁸⁰ Himonga, Taylor & Pope 'Reflections' (2013) *PELJ* 387.

²⁸¹ Himonga, Taylor & Pope 'Reflections' (2013) *PELJ* 387.

²⁸² Himonga, Taylor & Pope 'Reflections' (2013) *PELJ* 387.

²⁸³ Praeg *L Report on Ubuntu* (2014) 67.

2.7.3 The appropriate allocation of state resources as an expression of the core values of ubuntu

It is my firm submission that public officials who misappropriate state funds, so as to provide for their dependents/family relations and deem such misappropriation to be an expression of ubuntu, are wilfully electing to advance a malevolent distortion of the true meaning of ubuntu. In this regard I have had numerous encounters in the Eastern Cape (as the nodal point for criminal investigations against corrupt public officials over the course of a number of years) in which public officials serve to embrace/advance the aforementioned (distorted) version of ubuntu to justify their unlawful conduct.

It follows that it is critical to emphasise that ubuntu should be defined as honouring communal obligations (in the broadest possible terms) so as to forge a just and caring society in which all members are treated as having equal worth. It is submitted that a nuanced understanding of ubuntu highlights the importance of giving effect to communal obligations (which encompasses the sharing of resources) in the broadest possible terms. Thus, the utilisation of allocated state funds to meet the needs of an entire community (including the grand-abstraction of the nation-state as a whole) is a superior expression of ubuntu and decisively trumps any warped notion that a wayward public official might have of justifying his/her corrupt conduct through an appeal to ubuntu.

Thus, I am in agreement with Praeg, in being critical of the African Moral Theory as proposed by Metz, to the extent that nepotism could be viewed/justified as 'the logical implication of ubuntu'.²⁸⁴ In this regard Metz elects to defend the actions of the state in granting preferential treatment to certain individuals that had 'struggle credentials' as a means of promoting harmony in existing relations before seeking to fashion new friendships.²⁸⁵ Praeg rightfully refers to the ill-conceived and flawed reasoning of Metz in relation to the supposed ties between ubuntu and

²⁸⁴ Praeg L *Report on Ubuntu* (2014) 67.

²⁸⁵ Praeg L *Report on Ubuntu* (2014) 67.

nepotism as this serves to distort (as well as undermine) the true meaning of ubuntu.

2.7.4 The persistent association of ubuntu with patriarchy and other discriminatory practices

It is important to ascertain whether a present day ubuntu, stripped of its entrenched patriarchal values, is still able to make a telling contribution in political and social fields as well as in philosophical circles.²⁸⁶ It is consequently questioned whether ubuntu (so stripped) is different and can in fact make a difference.²⁸⁷ In this regard Kevy states that ubuntu (with specific reference to the patriarchal values it is seen to bolster) is alien to the values of a liberal democracy and its emancipatory potential is essentially undermined by its own core values.²⁸⁸ The aforementioned criticisms are countered by emphasising the failure on the part of Kevy to make a pivotal distinction between ubuntu as lived and experienced in times past and present day ubuntu philosophy as shaped by a postcolonial community.

Justice Sachs casts light on the manner in which tradition is shaped over time as follows:

‘We do not automatically invoke each and every aspect of traditional law as a source of values, just as we do not rely on all features of the common law. Thus, we reject the once powerful common law traditions associated with patriarchy and the subordination of servants to masters, which are inconsistent with freedom and equality, and we uphold and develop those many aspects of the common law, which feed into and enrich the fundamental rights enshrined in the Constitution. I am sure that there are many aspects and values of traditional African law, which will also have to be discarded or developed in order to

²⁸⁶ Praeg L *Report on Ubuntu* (2014) 45.

²⁸⁷ Praeg L *Report on Ubuntu* (2014) 45.

²⁸⁸ Kevy I ‘Ubuntu versus the core values’ (2014) 54.

ensure compatibility with the principles of the new constitutional order.’²⁸⁹

It is submitted that the aforementioned insight offered by Justice Sachs is of considerable importance as it emphasises that there were practices in terms of the common law (e.g. the master-servant relationship) which violated the constitutional principle of equality; similarly there will be practices in traditional African law that will have to cease (e.g. ingrained patriarchal practices as well as processual personhood) or be modified to find application in our constitutional dispensation.

Furthermore, Keevy disputes the notion that ubuntu is consistent with the values espoused in the Bill of Rights and refers with approval²⁹⁰ to the *Bhe* judgment in which the Constitutional Court had stated that African law is based on:

‘a deeply embedded patriarchy which reserved for women a position of subservience and subordination and in which they were regarded as perpetual minors under the tutelage of the fathers, husbands, or the head of the extended family’.²⁹¹

Keevy specifically focusses on contrasting ubuntu with the constitutionally guaranteed (core) rights of human dignity and equality as she believes that ubuntu is at odds with core values in the Bill of Rights.²⁹² However, it is worth repeating that codified customary law is not an accurate reflection of living African law as it has not stayed abreast of definitive changes in social conditions.²⁹³ Thus, codified customary law could be viewed as propping up patriarchal tendencies whilst undermining its communitarian edge.²⁹⁴

In addition, Keevy views ubuntu as a ‘collective folk philosophy’ in which patriarchal dominance (as part of the overarching narrative) ensures that

²⁸⁹ *Bhe v Magistrate, Khayelitsha and Others* 2005 (1) SA 580 (CC) para 383 (hereafter *Bhe*).

²⁹⁰ Keevy I ‘Ubuntu versus the core values’ (2014) 55.

²⁹¹ *Bhe* (2005) para 78.

²⁹² Keevy I ‘Ubuntu versus the core values’ (2014) 55.

²⁹³ Keevy I ‘Ubuntu versus the core values’ (2014) 60.

²⁹⁴ Keevy I ‘Ubuntu versus the core values’ (2014) 60.

subservient and oppressive views towards women are firmly embedded as part of the natural order of things.²⁹⁵ Furthermore, the patriarchal nature of ubuntu is viewed as inconsistent with core constitutional values as discrimination and subjugation are deemed to feature alongside the 'brotherhood' narrative.²⁹⁶ In this regard Keevy believes that the (alleged) oppressive nature of ubuntu undermines gender equality and disregards the dignity of African women.²⁹⁷ Furthermore, the concept of the right to equality is deemed to be dramatically different in Western jurisprudence as compared to ubuntu and (supposedly) gives credence to Keevy's argument that 'human rights law is fundamentally at odds with traditional African values'.²⁹⁸ Keevy concludes her argument by noting that:

'as a collective philosophy, ubuntu sustains not only communities, extended families, values, beliefs, tradition, morals, law and justice in these societies, but also the patriarchal hierarchy, discrimination, inequality and stereotyping of women, children, homosexuals, lesbians, witches, strangers and others.'²⁹⁹

The flaws in the abovementioned arguments of Keevy are exposed through her failure to grasp the nature and extent of the intersection between ubuntu and constitutional values.³⁰⁰ Keevy views matters through a 'binary opposition lens' in which gays and lesbians are depicted as being completely dependent on the rights afforded by the relevant constitutional principles.³⁰¹ This is due to her mistaken belief that ubuntu affords the aforementioned vulnerable groups no protection

²⁹⁵ Keevy I 'Ubuntu versus the core values' (2014) 66.

²⁹⁶ Keevy I 'Ubuntu versus the core values' (2014) 69.

²⁹⁷ Keevy I 'Ubuntu versus the core values' (2014) 69. Please see Magadla S & Chitando E 'The self become God: ubuntu and the "scandal of manhood"' in Praeg L & Magadla S (eds) *Ubuntu: Curating the Archive* (2014) (hereafter *The self become God*) 177 for the diametrically opposed position as endorsed in this thesis.

²⁹⁸ Keevy I 'Ubuntu versus the core values' (2014) 69.

²⁹⁹ Keevy I 'Ubuntu versus the core values' (2014) 78.

³⁰⁰ Magadla S & Chitando E 'The self become God' (2014) 189.

³⁰¹ Magadla S & Chitando E 'The self become God' (2014) 189.

whatsoever whilst patriarchy is (supposedly) determined to manipulate tradition so as to undermine the relevant constitutional rights.³⁰² Thus, Keesee does not account for a state of affairs in which numerous women, gays and lesbians regard themselves as guardians of ubuntu.³⁰³

The extreme criticism levelled at ubuntu, with specific reference to Keesee, in which rigid patriarchal values and the coercive tendencies of communitarianism are emphasised, fails at the expense of taking a measured view of ubuntu as an evolving philosophy in which past customs are revised in the present.³⁰⁴ There is a paradox at play in that Western modernity can critique the inherent values and associations of ubuntu much the same like ubuntu can offer a critique of the shortcomings/blind-spots of dominant Western philosophy.³⁰⁵ A case in point being the way dignity shapes the revitalisation of ubuntu which is mirrored by the way in which the recollection of ubuntu features in the reconstruction of dignity.³⁰⁶ I am in firm agreement with the view that a failure to recognise the aforementioned complexity and/or interplay between the present and the past (in shaping distinct philosophies in the present-day context) is suggestive of a 'passive-aggressive form of racism'.³⁰⁷

Magadla and Chitando seek to ascertain whether ubuntu could in fact play a role in reshaping masculine and feminine identities that have been altered by colonialism.³⁰⁸ It is necessary, as a starting point, to consider what being a man (as well as a woman) entails in this contemporary, postcolonial moment.³⁰⁹ Furthermore, attention should be paid to the manner in which the engagement between men and women should be structured and subsequently executed.³¹⁰ In this regard the

³⁰² Magadla S & Chitando E 'The self become God' (2014) 189.

³⁰³ Magadla S & Chitando E 'The self become God' (2014) 189.

³⁰⁴ Praeg L *Report on Ubuntu* (2014) 271.

³⁰⁵ Praeg L *Report on Ubuntu* (2014) 271.

³⁰⁶ Praeg L *Report on Ubuntu* (2014) 271.

³⁰⁷ Praeg L *Report on Ubuntu* (2014) 271.

³⁰⁸ Magadla S & Chitando E 'The self become God' (2014) 177.

³⁰⁹ Magadla S & Chitando E 'The self become God' (2014) 177.

³¹⁰ Magadla S & Chitando E 'The self become God' (2014) 177.

extraordinarily high levels of sexual and gender-based violence necessitates a clear understanding of 'the violence of male hegemony'.³¹¹ Thus, gender-based violence in this context is defined as 'a display of male power which manifests itself in various forms including physical, psychological, cultural, economic and sexual'.³¹² It is in this context that the role of ubuntu, in giving rise to comprehensively revised masculine identities, is explored so as to dismantle practices that subordinate women.³¹³

The thought-provoking contribution by Magadla and Chitando offers compelling insights with regards to the manner in which ubuntu could be utilised to dismantle patriarchal practices (as opposed to contending with persistent allegations of ubuntu being synonymous with pervasive patriarchal practices). In this regard Magadla and Chitando cast light on an extraordinary development in that African feminists are utilising ubuntu to protest gender violence as well as crafting solutions to bring an end to abhorrent patriarchal practices.

It is critical to draw a distinction between 'categories of masculinity' which include 'dominant, complicit, submissive and oppositional/protest' forms so as to grasp the full import of feminist studies which resist the view that men are inclined to exhibit violent behaviour.³¹⁴ It should be noted that sexual and gender-based violence is not a natural component of masculinity but rather of a specific type of masculinity called 'hegemonic masculinity'.³¹⁵ Thus, hegemonic masculinity seeks to advance a global ideology in which the subordination of women to men is the overarching objective.³¹⁶ In this regard Morell offers a critical insight in describing how hegemonic masculinity seeks to render silent other forms of

³¹¹ Magadla S & Chitando E 'The self become God' (2014) 177.

³¹² Magadla S & Chitando E 'The self become God' (2014) 177.

³¹³ Magadla S & Chitando E 'The self become God' (2014) 177. Please note that the view (as advanced by Magadla & Chitando) is in keeping with the insight offered by Justice Mokgoro in striving to create a just and caring world in *Khosa* (2004) para 65.

³¹⁴ Magadla S & Chitando E 'The self become God' (2014) 178.

³¹⁵ Magadla S & Chitando E 'The self become God' (2014) 178.

³¹⁶ Magadla S & Chitando E 'The self become God' (2014) 178.

masculinity and is characterised by 'misogyny, homophobia, racism and compulsory heterosexuality'.³¹⁷ Magadla and Chitando note with considerable interest that the rallying call to embrace ubuntu so as to promote 'social justice and fluid gender roles' has met with resistance from feminists in South Africa.³¹⁸ In this regard the specific example of Keevy is cited as she believes that ubuntu is synonymous with 'deep-seated patriarchy'.³¹⁹

The abhorrent outpouring of sexual violence is deemed to denote a 'moral vacuum' in which the destruction of values has been brought about by the advent of colonialism and apartheid.³²⁰ However, Magadla and Chitando believe that ubuntu is well placed to help society reimagine the shaping of an ethic of care in which the cultural definition of manhood is an integral part of personhood.³²¹ Thus, personhood can be defined as being constitutive of community rather than signifying the self.³²² Consequently, it offers an insightful perspective by employing a language that is fully understood (i.e. an ubuntu ethic of care) to transform masculinity in a manner that is not premised on Western ideals.³²³ This serves to disarm critics that are keen to tie (African) feminism with distorted Western values which are alien to the lived realities of African women.³²⁴ Thus, the underlying rationale for embracing an ubuntu ethic of care (in this context) is for men to view principled and vehement opposition to sexual and gender-based violence as an expression of their own value system in which respect for women is inseparable from respect for the community/nation.³²⁵ The

³¹⁷ Morell R 'Of boys and men: masculinity and gender in Southern African studies' *Journal of Southern African Studies* 24(4): 605-30 (1998) 608.

³¹⁸ Magadla S & Chitando E 'The self become God' (2014) 178.

³¹⁹ Magadla S & Chitando E 'The self become God' (2014) 178.

³²⁰ Magadla S & Chitando E 'The self become God' (2014) 183.

³²¹ Magadla S & Chitando E 'The self become God' (2014) 183. Please see Cornell D 'Exploring ubuntu-tentative reflections' available at www.fehe.org/index.php?id=281, (accessed 17 June 2016).

³²² Magadla S & Chitando E 'The self become God' (2014) 183. Please see Zulu P A *Nation in Crisis* (2013) 30.

³²³ Magadla S & Chitando E 'The self become God' (2014) 183.

³²⁴ Magadla S & Chitando E 'The self become God' (2014) 184. Please see Keevy I 'Ubuntu Versus the Core Values' (2014).

³²⁵ Magadla S & Chitando E 'The self become God' (2014) 184.

aforementioned insight provides a gilt-edged opportunity for ubuntu to dovetail with an individual human rights regime in making a significant contribution to reducing widespread sexual and gender violence in South Africa.

In addition, Posel suggests that an appeal to maleness that is premised on notions of being both provider and protector is more appealing (in a local context) than Western-inspired notions of individual freedom.³²⁶ Consequently, it is my firm view that the abovementioned 'ethic of care' is an embodiment of the core communal obligations' focus of ubuntu. Thus, the abovementioned ubuntu ethic of care lends itself to being adopted/embraced by public officials (both male and female) as a basis for prioritising the urgent needs of vulnerable groups. It follows that this will occur through an appeal to values that public officials are likely to be intimately familiar with (i.e. ubuntu) as opposed to a Western-inspired human rights regime. Consequently, it is submitted that the utilisation of ubuntu does not only mesh with a human rights regime but can in fact colour and bolster the realisation of those same rights.

In conclusion, Magadla and Chitando are keen to discern the intersection between an ubuntu ethic of care and a feminist ethic of care.³²⁷ This serves to demonstrate that it is misleading and simplistic to presume that traditional beliefs and the emancipatory ideals of feminism are as a rule incompatible.³²⁸ Magadla and Chitando dismiss the views of Keevy who believed that the ubuntu debate had only focussed on the positive aspects of ubuntu whilst conveniently ignoring its dark side (and the manner in which it supposedly undermined the rights of women and other vulnerable groups).³²⁹

³²⁶ Posel D 'The scandal of manhood: "baby rape" and the politicization of sexual violence in post-apartheid South Africa'. *Culture, Health and Sexuality* 7(3): 239 – 252 (2005) 248.

³²⁷ Magadla S & Chitando E 'The self become God' (2014) 187.

³²⁸ Magadla S & Chitando E 'The self become God' (2014) 187.

³²⁹ Magadla S & Chitando E 'The self become God' (2014) 187. Please see Gasa N 'The Traditional Courts Bill: A Silent Coup?' *South African Crime Quarterly* (2011) 25.

Magadla and Chitando endorse the view in which ubuntu is typecast as the reimagining of culture as a living tradition (which is practised by all members) rather than being the exclusive domain of traditional elders and the living-dead.³³⁰ A sobering realisation is brought to the fore in that ubuntu, as a living tradition, is constantly evolving and strongly contested, which lends itself to be utilised by both perpetrators of gender violence and those that choose to promote gender justice.³³¹ However, it is possible to negotiate a path through which tradition is purged of those practices that sustain gender inequality whilst continuing to be identified as a guardian of that same tradition.³³² Thus, there is indeed an opportunity to deploy ubuntu as a means to transform violent masculinity (in order to foster social solidarity in the time to come).³³³

2.7.5 The ever-present coercive edge of ubuntu

Ubuntu and African religion are the critical components of African law.³³⁴ African law seeks to restore equilibrium in both the physical and spiritual domain by placating the demands of the ancestral spirits.³³⁵ Furthermore, African law strongly advocates group duties as well as endorsing collective shame as a mechanism to deter (potential) offenders.³³⁶ In this regard Praeg provides valuable insight with regards to benevolent coercion (which serves as a marker for the outer limits of belonging) and is part and parcel of embracing ubuntu as a political choice as previously described.³³⁷ It is inevitable that ubuntu will continue to be characterised by contrasting views in either promoting 'transcendent humanism' or being defined by its 'coercive conformism'.³³⁸ However, the constitutive violence that is present in ubuntu (or any other communitarian philosophy) should be rendered

³³⁰ Magadla S & Chitando E 'The self become God' (2014) 187.

³³¹ Magadla S & Chitando E 'The self become God' (2014) 187.

³³² Magadla S & Chitando E 'The self become God' (2014) 187.

³³³ Magadla S & Chitando E 'The self become God' (2014) 187.

³³⁴ Keevy I 'Ubuntu versus the core values' (2014) 60.

³³⁵ Keevy I 'Ubuntu versus the core values' (2014) 60.

³³⁶ Keevy I 'Ubuntu versus the core values' (2014) 63.

³³⁷ Praeg L *Report on Ubuntu* (2014) 175.

³³⁸ Praeg L *Report on Ubuntu* (2014) 175.

visible as it represents the logic of coercion as a political choice.³³⁹ It is important to recognise that a standing criticism of ubuntu (styled as African Communitarianism) by liberals is that of the inherent violence or coercion in all forms of communitarianism.³⁴⁰

However, Praeg is quick to dispel any notions of racism in noting the coercive mechanisms at play in ubuntu as he views it as the 'flip side of the same coin of interdependence'.³⁴¹ Thus, Praeg believes that the reception of ubuntu has been sanitised so as to portray 'its constitutive violence in the socially acceptable language of desirable outcomes' as per the 'compulsory reconciliation' in *AZAPO*.³⁴² Furthermore, the aforementioned 'sanitising mechanism' also sought to strip from ubuntu any association with coercive strategies that were deployed so as to shape the conduct of individuals in their quest to be viewed as people with ubuntu.³⁴³

2.7.6 The utilisation of the communal obligations' focus of ubuntu to promote accountability and bolster social solidarity

It is submitted that the communal obligations' focus of ubuntu should be embraced as a political choice in order to colour and sustain our constitutional values.

Ubuntu offers so much more than an unwavering expectation to receive equal and fair treatment.³⁴⁴ In *Barkhuizen v Napier* the court held that ubuntu compels the individual to:

'...give the same respect, dignity, value and acceptance to each member of [the] community. More importantly, it regulates the exercise of rights by the emphasis it lays on sharing and co-responsibility and the mutual enjoyment of rights by all'.³⁴⁵

³³⁹ Praeg L *Report on Ubuntu* (2014) 175.

³⁴⁰ Praeg L *Report on Ubuntu* (2014) 175.

³⁴¹ Praeg L *Report on Ubuntu* (2014) 66.

³⁴² *AZAPO* (1996) para 48.

³⁴³ Praeg L *Report on Ubuntu* (2014) 66.

³⁴⁴ Bennett T 'Ubuntu' (2011) 14 *PELJ* 52.

³⁴⁵ *Barkhuizen v Napier* 2007 7 BCLR 691 (CC) para 224-225.

In this regard Langa CJ in *MEC for Education: KwaZulu-Natal v Pillay* cites Kwame Gyekye who had stated that: 'an individual person cannot develop and achieve the fullness of his/her potential without the concrete act of relating to other individual persons'.³⁴⁶ Consequently, Praeg rightfully believes that ubuntu does not seek to prioritise individual (and even collective rights) as much as it seeks to emphasise duties and obligations.³⁴⁷

It is necessary to draw a distinction between association and obligation so as to promote a better understanding of ubuntu.³⁴⁸ The spirit of association is captured by the phrase 'I am because we are' as 'one's existence is recognised as a function of the existence of others'.³⁴⁹ Thus, there is a definitive need to identify and discharge certain obligations as a means of sustaining the existence of the concept 'we'.³⁵⁰ Obligations, on the other hand, are to be viewed as a clear manifestation of the associations enjoyed by a human being in that:

'To have no obligation is not to belong; it is not to be fully and socially human. Obligations therefore, are not seen (as the Western concept seems to imply) as impositions, claims on one's otherwise better used time and energy, but as a means of sustaining one's place in a network of belonging: that most vital attribute of humanity, sociability and, ultimately, being in the world.'³⁵¹

It is submitted that the aforementioned perspective regarding obligations is an extraordinary way to capture the purity of the ideal in giving effect to (communal) obligations on the part of any public official as a means to promote our shared humanity. Furthermore, association can be viewed as a powerful form of communitarianism and the attendant

³⁴⁶ *MEC for Education: KwaZulu-Natal v Pillay* para 53.

³⁴⁷ Praeg L *Report on Ubuntu* (2014) 54.

³⁴⁸ Praeg L *Report on Ubuntu* (2014) 42.

³⁴⁹ Praeg L *Report on Ubuntu* (2014) 42.

³⁵⁰ Praeg L *Report on Ubuntu* (2014) 42. Please see Zulu P *A Nation in Crisis* (2013) 20.

³⁵¹ Praeg L *Report on Ubuntu* (2014) 42.

reciprocal obligations depict morally good behaviour (i.e. conduct that strengthens the association) and morally bad behaviour (i.e. conduct that undermines the functioning and/or existence of the association).³⁵²

It should be noted that what is in fact required is embracing and highlighting the manner in which ubuntu could in fact strengthen and deepen our understanding of both communitarian and individualistic approaches by shedding light on the 'interplay between rights and obligations' as experienced by individuals in contemporary society.³⁵³ Consequently, it is correctly asserted that the perceived contribution that ubuntu could make in contemporary times is shaped by the central idea that 'the membership of imagined communities entails duties and obligations'.³⁵⁴ In this regard, Justice Langa stated that ubuntu recognises a person's status as a human being which entitles one to unconditional respect, dignity, value and acceptance.³⁵⁵ However, the aforementioned person has a corresponding duty to extend the same respect, dignity, value and acceptance to every other member of that community.³⁵⁶ The learned judge continues by stating that ubuntu requires the exercising of rights in a manner which emphasises sharing and co-responsibility so as to ensure the enjoyment of rights by all members.³⁵⁷ Zulu echoes the sentiments of the abovementioned academic contributions by making the observation that 'human rights' is constantly bandied about in the South African context but 'obligations' are hardly ever mentioned.³⁵⁸ In this regard it is of paramount importance to acknowledge that the concept of (communal) obligations goes hand in hand with embracing ubuntu and public officials (as one of the focus groups in this thesis) are entitled to enjoy those rights that are afforded to them in terms of the Constitution. However, the aforementioned public

³⁵² Praeg L *Report on Ubuntu* (2014) 43.

³⁵³ Praeg L *Report on Ubuntu* (2014) 54.

³⁵⁴ Makwanyane (1995) para 224.

³⁵⁵ Makwanyane (1995) para 224.

³⁵⁶ Makwanyane (1995) para 224.

³⁵⁷ Makwanyane (1995) para 224.

³⁵⁸ Zulu P *A Nation in Crisis* (2013) 20.

officials are also duty-bound to come to the aid of vulnerable groups in accessing key socio-economic rights.

However, ubuntu does not give rise to a social bond through an underlying imagined social contract but rather it is deemed to be 'both the African principle of transcendence for the individual, and the law of the social bond'.³⁵⁹ Thus, it is deemed to be a grave misunderstanding of ubuntu to view it as 'simple-minded communitarianism' as ubuntu denotes a state of being where one comes into the world obligated to others much the same like the others are obligated to you (and everyone else).³⁶⁰

Ubuntu is linked with *seriti* with the latter depicted as the life force which binds a community of people to each other.³⁶¹ This life force is shaped by a persistent interchange between personhood and the community at large so that the life force of the community is ultimately affected through its engagement with every individual in that same community.³⁶² Thus, *seriti* serves to weaken us all if we fail to discharge our obligations in providing the necessary care and embracing our roles as duty-bearers in the community.³⁶³ Consequently, the denial of access to a renal-dialysis machine to a member of the nation-state due to his inability to pay for life-saving treatment (with specific reference to the *Soobramoney* matter) is viewed as a physical loss sustained by the community in being 'drained of our humanity'.³⁶⁴

However, it is my contention that so much more than a display of sympathy should be expected (and required) of public officials as these same officials are tasked to ease the plight of vulnerable groups by securing the progressive realisation of critical socio-economic rights. Furthermore, this is consistent with the communal obligations' focus of

³⁵⁹ Cornell D & Muvangua N 'Ubuntu and the law: African ideals and post-apartheid jurisprudence' (2012) 3.

³⁶⁰ Cornell D & Muvangua N 'Ubuntu and the law: African ideals and post-apartheid jurisprudence' (2012) 3.

³⁶¹ Cornell D & Muvangua N 'Ubuntu and the law: African ideals and post-apartheid jurisprudence' (2012) 3.

³⁶² Cornell D & van Marle K 'Exploring ubuntu' (2012) 331.

³⁶³ Cornell D & van Marle K 'Exploring ubuntu' (2012) 332.

³⁶⁴ Cornell D & van Marle K 'Exploring ubuntu' (2012) 332.

ubuntu in creating a society in which vulnerable groups are treated as having equal worth through giving effect to continuous humanising acts on the part of public officials. Thus, this entails public officials discharging the aforementioned duties (i.e. the facilitation of the realisation of socio-economic rights) in the present time or near future rather than at some uncertain point in the distant future. In addition, Coertze offers an interesting insight in that:

‘Neither the traditional nor the acculturative formulation of ubuntu or *botho* imbued the individual with specific rights as a human being. To be human, as of old, meant to shoulder the concomitant duties and thus to be judged an example to others’.³⁶⁵

Thus, the increased prominence of the human rights discourse provided for the granting of rights to all people but neglected to promote a similar focus and emphasis on the (reciprocal) duties owed.³⁶⁶ This was a clear break from the past where embracing duties on the part of members was emphasised as a means to forge/sustain cohesion in group entities.³⁶⁷ It is common cause that colonialism served to undermine ‘the political economy of obligation as a sustained and coherent praxis’.³⁶⁸ The aforementioned shift was amplified by a further change as brought about by the consolidation of a human rights perspective that favoured the safeguarding of individual rights above social obligations.³⁶⁹

It follows that ubuntu should not be viewed as synonymous with a human rights regime nor representing communalism in such a fashion as to make it impossible to dovetail with a human rights discourse as provided for by the Constitution.³⁷⁰ Ubuntu can in fact be articulated so as to

³⁶⁵ Coertze RD ‘Ubuntu and nation building’ *South African Journal of Ethnology* 24(4) (2001) 115.

³⁶⁶ Coertze RD ‘Ubuntu and nation building’ *South African Journal of Ethnology* 24(4) (2001) 117.

³⁶⁷ Coertze RD ‘Ubuntu and nation building’ *South African Journal of Ethnology* 24(4) (2001) 117.

³⁶⁸ Praeg L *Report on Ubuntu* (2014) 61.

³⁶⁹ Praeg L *Report on Ubuntu* (2014) 61.

³⁷⁰ Praeg L *Report on Ubuntu* (2014) 61.

present us with a radically different notion of the underlying principle of the law which in turn shapes a dramatically altered perspective on rights and responsibilities.³⁷¹ Thus, an obligation could extend beyond what would be permitted under social contract theory as the pursuit of a just community was an integral component of advancing freedom (and the quality of life) for all in that community.³⁷² In addition, it is believed that ubuntu would not mimic the possession of rights and their corresponding duties which define social contract theory.³⁷³ It should be noted that a detailed discussion of social contract theory falls outside the scope of this thesis but the aforementioned points serve as a brief illustration of the true extent of the communal obligations owed upon embracing ubuntu. Furthermore, a nuanced understanding of the aforementioned communal obligations' focus of ubuntu serves to shape the conduct of interconnected and interdependent members (living side by side) in striving to forge a just and caring nation-state.

2.8 Summary

A key aim of this Chapter is to interrogate ubuntu so as to discern the contribution that it could potentially make in a contemporary context. Thus, it is submitted that ubuntu could indeed serve to shape the conduct of public officials and state institutions (in fostering a deep-seated awareness of the primacy of communal obligations) and in so doing prioritise the needs of vulnerable groups.

Furthermore, embracing the values and spirit of ubuntu (on the part of public officials) will promote accountability by impacting on the manner in which each and every decision is taken so as to reflect a sincere concern for the wellbeing of all members of the nation-state. Thus, ubuntu is well suited to promote the accountability of public officials (as explored in Chapter 3) by shaping a vision of shared obligations so as to pursue the urgent realisation of the socio-economic rights as enshrined

³⁷¹ Cornell D & van Marle K 'Exploring ubuntu' (2012) 357.

³⁷² Cornell D & van Marle K 'Exploring ubuntu' (2012) 357.

³⁷³ Cornell D & van Marle K 'Exploring ubuntu' (2012) 357.

in the Constitution. In addition, it is my submission that a communal obligations' focus is at the heart of ubuntu and it is subsequently well placed to make a significant contribution in our constitutional democracy in light of its ability to mesh with a human rights regime as explored in Chapter 3. Furthermore, the state is duty-bound to give effect to socio-economic rights which is in keeping with the communal obligations' focus of ubuntu and is consistent with recognising the interdependence and interconnectedness of members living side by side in a just and caring nation-state.

CHAPTER 3 - PART A (ACCOUNTABILITY IN THE PUBLIC SECTOR)

3.1 Introduction

Chapter 3 is divided into Part A and Part B.³⁷⁴

Part A is focussed on the accountability of the state with specific reference to the progressive realisation of critical socio-economic rights. The relevant provisions of the Constitution, which serve to inform the accountability of the state, will be explored in due course in this section. Also, the international law commitments of the Republic of South Africa (with specific reference to the ratification of the International Covenant/ICESCR in 2015) will be scrutinised as it serves to draw attention to the specific obligations of the state. Furthermore, the minimum-core obligation approach, as advanced by Bilchitz, will be carefully analysed and expanded upon in this section in light of it being fully endorsed in this thesis.

It follows that Part A will also explore the pressing need to give effect to the progressive realisation of socio-economic rights as a means to cast light on the nature and extent of the duties owed by the state to the public. Furthermore, the manner in which ubuntu can both mesh with an individual human rights regime (as well as facilitate the realisation of key socio-economic rights) will be examined in this section.

Chapter 2 sought to provide a nuanced understanding of the role that ubuntu could fulfil in a contemporary constitutional democracy. The previous chapter also highlighted the manner in which ubuntu could in fact mesh with a human rights regime. In addition, Chapter 2 also demonstrated the clear link between ubuntu (understood as an unwavering focus on communal obligations) and the accountability of public officials in relation to the progressive realisation of socio-economic rights.

³⁷⁴ Please find Part B at Section 3.6.

It is submitted that the accountability of public officials and state institutions is at the heart of this thesis which serves to explain the detailed analyses provided in this Chapter. However, the contribution that ubuntu could make in a contemporary context should be downplayed in the absence of a radical transformation of the lived reality of vulnerable groups in the near future. Thus, this Chapter seeks to provide critical insight as to the nature and extent of the duties owed by the state to the public as related to the progressive realisation of socio-economic rights.

It is further submitted that ubuntu, with a specific focus on communal obligations as previously stated, can act as a catalyst and play a critical role in promoting the accountability of public officials so as to give effect to the aspirational values as well as socio-economic rights as enshrined in the Constitution. Ubuntu is well suited to play this role due to its ethical and political potency³⁷⁵ and in light of its ability, if properly defined as above, to mesh with a human rights regime. Furthermore, public officials that 'embrace' ubuntu or are 'imbued with ubuntu' should be understood (as previously defined in Chapter 1) to mean those specific public officials that have an unwavering focus on communal obligations and seek to give effect to continuous humanising acts.³⁷⁶ This is consistent with the spirit and purport of the Constitution in seeking to give effect to socio-economic rights (as well as aspirational values) as a means of creating a just and caring nation-state.

In addition, Mureinik advances a persuasive argument in favour of constitutionalism in that it nurtures an environment in which all decisions taken by those occupying powerful positions (including the legislature) have to be justified.³⁷⁷ It should be noted that an unerring focus on the aforementioned justification of state action has positive knock-on effects

³⁷⁵ Cornell D 'Exploring ubuntu-tentative reflections' available at www.fehe.org/index.php?id=281 (accessed 17 June 2016).

³⁷⁶ Praeg L *Report on Ubuntu* (2014) 20.

³⁷⁷ Mureinik E 'A bridge to where? Introducing the interim bill of rights' *SAJHR* 10 (1994) 31 (hereafter A bridge to where?).

with regards to laws and policies.³⁷⁸ This in turn gives rise to an elevated level of accountability which shapes the conduct of public officials in that they have to grapple with the underlying reasons in making decisions which assist in highlighting flawed decisions.³⁷⁹ The aforementioned insights offered by Mureinik overlap with the views endorsed in this thesis in which embracing ubuntu on the part of public officials will lead to better decision-making (through agonising over those same decisions) as a means to honour the obligations (both in a communal and constitutional sense) as owed to vulnerable groups.

Furthermore, it is of pivotal importance when assessing unconditional obligations to ascertain what must be achieved as well as who bears the responsibility for making it happen.³⁸⁰ Consequently, it is critical for the state, as the custodian of information required for the facilitation and realisation of socio-economic rights, to demonstrate the necessary accountability by disseminating that same information to the public as and when required.³⁸¹ Thus, public officials who are diligent in their duties (and consequently faithfully adhere to the relevant accountability principles) will seek to provide critical information to the public on an ongoing basis as part of giving effect to a sustainable stakeholder engagement strategy. It is submitted that the aforementioned conduct of diligent public officials is a manifestation of the communal obligations' focus of ubuntu. This serves to bolster my contention that there is a demonstrable and definitive link between ubuntu, accountability and the realisation of socio-economic rights.

3.2 A working definition of accountability as encountered in the public sector

It is noted that the human rights community has moved beyond affirming the importance of socio-economic rights and that same community is

³⁷⁸ Mureinik E 'A bridge to where?' *SAJHR* 10 (1994) 31.

³⁷⁹ Mureinik E 'A bridge to where?' *SAJHR* 10 (1994) 31.

³⁸⁰ Bilchitz D *Poverty and Fundamental Rights -The Justification and Enforcement of Socio-Economic Rights* (2007) 91 (hereafter *Poverty and Fundamental Rights*).

³⁸¹ Please see Section 3.4.1 (re Dissemination of Information).

now focused on innovative and practical ways of enforcing and monitoring the advancement of these rights.³⁸² Socio-economic rights are deemed to be critical tools for securing social justice and a better life for all in South Africa.³⁸³ However, the utility of socio-economic rights is dependent on all state institutions (as well as civil society organisations) embracing the importance of this group of rights despite it being cast to the periphery historically.³⁸⁴ Thus, there is a clear need to strengthen the core content of socio-economic rights as well as augment practical measures (to implement those same rights) as a means of making a significant difference in the lives of vulnerable groups living in abject poverty.³⁸⁵ It should be readily apparent that knowledge of these rights is required in order for them to be claimed by the very people that stand to benefit from them.³⁸⁶ Thus, facilitating increased awareness and knowledge of socio-economic rights amongst vulnerable groups is a critical challenge for the state, independent commissions and NGOs in the human rights arena.³⁸⁷ In this regard the dissemination of information will be discussed in due course.³⁸⁸

It should be noted at the outset that rights have two interrelated yet distinct parts.³⁸⁹ The negative component compels the state to respect a particular right by not undermining the enjoyment of that same right.³⁹⁰ The positive component of a right (as to be found in all rights in the Bill of Rights) is imbued with the transformative spirit of the Constitution.³⁹¹ Thus, the positive aspect of the right to equality obliges the state to implement steps to achieve the vision of a society in which all individuals

³⁸² Liebenberg S 'The interpretation of socio-economic rights' Chaskalson M *et al* (eds) *Constitutional Law of South Africa* 2 ed (2003) (hereafter Interpretation of socio-economic rights).

³⁸³ Liebenberg S 'Interpretation of socio-economic rights' (2003) (Section 33.2) 1-3.

³⁸⁴ Liebenberg S 'Interpretation of socio-economic rights' (2003) (Section 33.2) 1-3.

³⁸⁵ Liebenberg S 'Interpretation of socio-economic rights' (2003) (Section 33.2) 1-3.

³⁸⁶ Liebenberg S 'Interpretation of socio-economic rights' (2003) (Section 33.2) 1-3.

³⁸⁷ Liebenberg S 'Interpretation of socio-economic rights' (2003) (Section 33.2) 1-3.

³⁸⁸ Please see Section 3.4.1.

³⁸⁹ De Vos P 'Grootboom, the right of access to housing and substantive equality as contextual fairness (2001) 17 *SAJHR* 273 (hereafter *Grootboom*).

³⁹⁰ De Vos P 'Grootboom' (2001) *SAJHR* 273.

³⁹¹ De Vos P 'Grootboom' (2001) *SAJHR* 274.

are immersed in an environment characterised by equal concern and mutual respect rather than being treated equally in a formal sense.³⁹² Thus, it is of paramount importance to recognise that the right to equality is more than just a guarantee of equal treatment as per the various decisions of the Constitutional Court.³⁹³

It should further be noted that the search for 'contextual fairness' is at the centre of the equality jurisprudence of the Constitutional Court.³⁹⁴ The transformative vision of the Constitution obliges the state to forge a society in which people can live lives of dignity and are able to realise their full potential.³⁹⁵ However, the conduct on the part of the state (to realise such a vision) should be both fair and reasonable to those people affected by the act or omission.³⁹⁶ Consequently, it is critical to appreciate that equality is also a social and economic issue rather than being confined to an abstract and formalistic debate (e.g. seeking to ascertain whether the human dignity of an individual has been violated in a specific instance).³⁹⁷

De Vos highlights that a focus on the transformative nature of the right to equality provides opportunities to utilise both section 9(3) as well as sections 26 and 27 'to hold the state accountable for failures to address the needs of the socially and economically most vulnerable sections of society'.³⁹⁸ Thus, the manner in which public officials and state institutions discharge their respective duties (in a manner embracing the spirit of ubuntu) will be explored in order to strive for a situation where at least the core³⁹⁹ part of the constitutionally protected socio-economic rights could be given effect to at all times. However, the broader

³⁹² De Vos P 'Grootboom' (2001) SAJHR 274.

³⁹³ Please see *Harksen v Lane* NO 1998 (1) SA 300 (CC) (hereafter *Harksen v Lane*) para 54. Please also see *City Council of Pretoria v Walker* 1998 (2) SA 363 (CC) (hereafter *Pretoria v Walker*) paras 73 – 81.

³⁹⁴ De Vos P 'Grootboom' (2001) SAJHR 275. Please see *Harksen v Lane* (1998) para 54. Please also see *Pretoria v Walker* (1998) paras 73 – 81.

³⁹⁵ De Vos P 'Grootboom' (2001) SAJHR 275.

³⁹⁶ De Vos P 'Grootboom' (2001) SAJHR 275.

³⁹⁷ De Vos P 'Grootboom' (2001) SAJHR 276.

³⁹⁸ De Vos P 'Grootboom' (2001) SAJHR 276.

³⁹⁹ Please see expanded discussion regarding the minimum core obligation at Section 3.5.

objective of this thesis will be to provide a novel approach in bolstering the content and reach of those same constitutionally protected rights (in the shortest possible time) so that vulnerable groups could derive the maximum possible enjoyment from them.

The state has failed to make significant inroads in realising urgent subsistence rights⁴⁰⁰ (comprised of the rights to food, housing and health care) on behalf of vulnerable groups in South Africa. It is submitted that an ubuntu-inspired approach can both colour and promote the accountability of public officials in promoting the realisation of socio-economic rights. However, it is indeed necessary for the state to demonstrate the required political will in fashioning the second (economic) transition. This will ensure that we forge a nation-state in which all within its borders are provided with the necessary means not only to survive but also to live lives of purpose.

It is important to note that litigation is not the only strategy that could give effect to the realisation of socio-economic rights as other strategies include lobbying and advocacy of public institutions, ongoing monitoring of the advancement of socio-economic rights as well as awareness campaigns.⁴⁰¹ Thus, the UN Committee on Economic, Social and Cultural Rights ('UNCESR' or 'UN Committee') has repeatedly stressed the importance of devising a 'transparent, participatory national strategy and plan of action' for progressively giving effect to the relevant socio-economic rights.⁴⁰² The aforementioned plan should contain 'targets, indicators and benchmarks' which facilitate the monitoring of progress by the public, institutions such as the South African Human Rights

⁴⁰⁰ Bilchitz D *Poverty and Fundamental Rights* (2007) Introduction.

⁴⁰¹ Liebenberg S 'Editorial: special edition' (1999) 1 *ESR Review* (hereafter Editorial).

⁴⁰² General Comment No. 4: The Right to Adequate Housing (Art. 11 (1) of the Covenant), <http://www.refworld.org/docid/47a7079a1.html>, (accessed 1 August 2016) para 12. Please see General Comment No.12: The Right to Adequate Food, <http://www.refworld.org/pdfid/4538838c11.pdf>, (accessed 1 August 2016) paras 21 – 30. Please also see General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12 of the Covenant), <http://www.refworld.org/docid/4538838d0.html>, (accessed 1 August 2016) para 43(f).

Commission ('SAHRC') and the government itself.⁴⁰³ Furthermore, it is necessary for special attention to be paid to vulnerable groups in the formulation and implementation of the aforementioned plan.⁴⁰⁴ Also, the obligation borne by the state to devise a transparent national plan of action (to give effect to socio-economic rights) promotes public accountability and involvement in the advancement of socio-economic rights.⁴⁰⁵ This in turn provides the platform for 'targeted, purposeful action' by the state in giving effect to socio-economic rights.⁴⁰⁶ In addition, accountability is defined in essence as being 'responsible' or 'answerable to' which reflects the core duty owed by a public official (as the duly appointed representative of the state) to the people of South Africa.⁴⁰⁷ It is submitted that the aforementioned insights serve to provide a nuanced understanding of what is in part expected of an 'accountable state'. The Constitution provides additional clarity as to the duty owed by the aforementioned public official in that:

'This Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom'.⁴⁰⁸

The primary focus in this thesis is to shed light on the nature and extent of the duties of the state (and by implication the duties of the relevant public officials and state institutions as representatives of the state) in giving effect to socio-economic rights as an expression of accountability to the public as previously explained. 'The public' is defined as all people (embracing the extremes of those living in abject poverty and the privileged elite as well as everyone in between) that have made South Africa their home and have a vested interest in ensuring that all within our borders are free from immediate threats to their survival as a minimum standard. The aforementioned minimum standard should be satisfied as a matter of urgency so that people can live lives of value as

⁴⁰³ Liebenberg S 'Interpretation of socio-economic rights' (2003) (Section 33.5) 13.

⁴⁰⁴ Liebenberg S 'Interpretation of socio-economic rights' (2003) (Section 33.5) 13.

⁴⁰⁵ Liebenberg S 'Interpretation of socio-economic rights' (2003) (Section 33.5) 13.

⁴⁰⁶ Liebenberg S 'Interpretation of socio-economic rights' (2003) (Section 33.5) 13.

⁴⁰⁷ The Penguin English Dictionary 2ed 9.

⁴⁰⁸ Constitution of the Republic of South Africa, 1996.

per their own definition and/or understanding. Thus, there is a need to develop clear sectoral benchmarks so as to hold public officials accountable and ensure that they realise critical socio-economic rights as a matter of urgency. In this regard the critical contribution by Bilchitz, relating to the minimum core obligation approach,⁴⁰⁹ will be explored in part through conducting an overview of the relevant socio-economic rights jurisprudence of the Constitutional Court.

Praeg notes that it may have more to do with (alarming) indifference rather than difference in the lived reality of a contemporary South Africa (which is no longer an apartheid state but cannot be regarded as a post-apartheid state) if one considers how it has failed to give effect to its emancipatory potential and rich promise.⁴¹⁰ A case in point being the absence of basic subsistence rights as required by poverty-stricken communities/vulnerable groups. Thus, it is submitted that the state has failed to satisfactorily discharge its obligations (in terms of the progressive realisation of urgent socio-economic rights) since the advent of democracy. In this regard the state has been unable to significantly reduce the number of people who continue to live in abject poverty and (consequently) have limited access to adequate nutrition, proper shelter and suitable health services amongst other things.⁴¹¹

In addition, the state defends its 'service-delivery' track record by routinely citing 'scarce state resources' as a means to downplay the limited realisation of the socio-economic rights regime.⁴¹² However, this is not consistent with an acceptable accountability standard in the absence of the state furnishing detailed information of its available resources. Also, there is an urgent need on the part of the state to acknowledge its poor track record (in respect of the progressive realisation of socio-economic rights) and embrace its obligations anew

⁴⁰⁹ Please see Section 3.5 regarding the Minimum Core Obligation approach.

⁴¹⁰ Praeg L *Report on Ubuntu* (2014) Introduction.

⁴¹¹ Please see 'Health and Health Care in South Africa – 20 Years after Mandela' Mayosi BM & Benatar SR *New England Journal of Medicine* (2014) 371: 1344 – 1353. Please also see *Soobramoney* (1998) para 8 and *Azapo* (1996) para 43.

⁴¹² Please see *Soobramoney* (1998) paras 21 and 41. Please also see *Grootboom* (2000) para 46.

in prioritising the advancement of urgent socio-economic rights which should strive to eliminate the suffering endured by vulnerable groups.

Furthermore, a focus on the realisation of specific socio-economic rights will provide insight as to the inherent tension between scarce state resources and giving effect to constitutionally protected rights. In addition, the manner in which public officials embrace ubuntu could facilitate the progressive realisation of socio-economic rights. This will shed light on an acceptable accountability standard that is to be devised and implemented by the state so as to progressively meet the urgent needs of vulnerable groups. In this regard the *Soobramoney* case will be extensively analysed as it provides illuminating insights into the accountability standard which should, as a rule, be demanded of the state when adjudicating on matters concerning the realisation of urgent socio-economic rights. Furthermore, the critical role of the Constitutional Court in providing determinate content to specific socio-economic rights will be examined.

It is submitted that an unwavering focus on the realisation of socio-economic rights provides an exemplary platform/reference point to assess the track record of the state in demonstrating the necessary political will to meet the urgent needs of vulnerable groups. Thus, Gordon believes that to embrace ubuntu is to heed the call to insist upon accountability that is radical in its very nature.⁴¹³ It should be noted that the aforementioned reference to accountability includes assuming full responsibility for every aspect of the inherent emancipatory potential of ubuntu as well as the conditions required for that same potential to be unleashed.⁴¹⁴ Consequently, it is my contention that the aforementioned insight offered by Gordon outlines the standard that public officials (who have embraced ubuntu) should strive for in forging a nation-state that is celebrated for its shared humanity.

⁴¹³ Gordon L 'Justice otherwise: thoughts on ubuntu' in Praeg L & Magadla S (eds) *Ubuntu: Curating the Archive* (2014) 22.

⁴¹⁴ Gordon L 'Justice otherwise: thoughts on ubuntu' in Praeg L & Magadla S (eds) *Ubuntu: Curating the Archive* (2014) 22.

Furthermore, the *In Re: Certification of the Constitution of the Republic of South Africa*⁴¹⁵ judgment serves to provide the necessary context with regards to the adjudication and fulfilment of socio-economic rights alongside civil and political rights. In this regard the Constitutional Court held that:

‘it is true that the inclusion of socio-economic rights may result in courts making orders which have direct implications for budgetary matters. However, even when a court enforces civil and political rights such as equality, freedom of speech and the right to a fair trial, the order it makes will often have such implications’.⁴¹⁶

The Court continued as follows:

‘We are of the view that these rights are, at least to some extent justiciable...Many of the civil and political rights will give rise to similar budgetary implications without compromising their justiciability. The fact that socio-economic rights will almost inevitably give rise to such implications does not seem to us a bar to their justiciability’.⁴¹⁷

3.3 Constitutional provisions relating to the accountability of public officials to facilitate the progressive realisation of socio-economic rights

A key feature of the South African Constitution is its clear commitment to the principle of the interdependency of all human rights (i.e. civil and political as well as economic, social and cultural rights).⁴¹⁸ Consequently, it is noted that the term interdependence attempts to capture the idea that values seen as directly related to the full development of personhood cannot be protected and nurtured in

⁴¹⁵ *In Re: Certification of the Constitution of the Republic of South Africa* 1996 (4) SA 744 (CC).

⁴¹⁶ *In Re: Certification of the Constitution of the Republic of South Africa* 1996 (4) SA 744 (CC) para 77.

⁴¹⁷ *In Re: Certification of the Constitution of the Republic of South Africa* 1996 (4) SA 744 (CC) para 78.

⁴¹⁸ Liebenberg S ‘Interpretation of socio-economic rights’ (2003) (Section 33.1) 1.

isolation.⁴¹⁹ Thus, this serves to underscore the belief that human beings should be treated holistically in order to protect human welfare.⁴²⁰

Socio-economic rights are viewed as providing for the 'material dimensions of human welfare'.⁴²¹ Their recognition as human rights is derived from 'an acknowledgement that without food, water, shelter, health care, education and social security, human beings cannot survive, live with dignity or develop to their potential'.⁴²² Thus, a Bill of Rights that prioritises civil and political rights (at the expense of socio-economic rights) will become an instrument wielded by the wealthy and powerful as a means to protect their privileged position.⁴²³ The inclusion of socio-economic rights in the South African Constitution is an express endorsement of the philosophy that countering the effects of poverty is 'a matter of fundamental constitutional concern'.⁴²⁴

The Preamble states that one of the aims of adopting the Constitution as the supreme law of the Republic is to 'improve the quality of life and free the potential of each person'.⁴²⁵ It is submitted that a firm grasp of the transformative nature of the Constitution is indeed necessary to colour and drive the accountability of public officials. In this regard there are striking parallels between this enlightened understanding of the transformative nature of the Constitution and the communal obligations' focus of ubuntu in creating a just and caring society as previously stated. Also, this is consistent with the sentiments of Roux who believes that the South African Constitution was set up in such a manner so as to dismantle the legacy of apartheid and that justiciable socio-economic rights were a critical component in realising this ambitious vision.⁴²⁶

⁴¹⁹ Scott C & Alston P 'Adjudicating Constitutional Priorities in a Transnational Context: A Comment on *Soobramoney's* Legacy and *Grootboom's* Promise' (2000) 16 *SAJHR* 206 (hereafter *Adjudicating constitutional priorities*).

⁴²⁰ Liebenberg S 'Interpretation of socio-economic rights' (2003) (Section 33.1) 1.

⁴²¹ Liebenberg S 'Interpretation of socio-economic rights' (2003) (Section 33.1) 1.

⁴²² Liebenberg S 'Interpretation of socio-economic rights' (2003) (Section 33.1) 1.

⁴²³ Liebenberg S 'Interpretation of socio-economic rights' (2003) (Section 33.1) 1.

⁴²⁴ Liebenberg S 'Interpretation of socio-economic rights' (2003) (Section 33.1) 1.

⁴²⁵ Preamble to the Constitution of the Republic of South Africa, 1996.

⁴²⁶ Roux T 'Understanding *Grootboom*' (2002) *Forum Constitutional* 43.

The Bill of Rights includes an array of civil, political and socio-economic rights and it reflects the internationally acknowledged belief that all human rights are interdependent and indivisible.⁴²⁷ In this regard it is important to bear in mind that different rights find application in support of each other as the realisation of a specific right might rely on another right being secured first.⁴²⁸ Thus, it should be apparent that a starving person will find it near impossible to give effect to his/her freedom of speech (i.e. a person that has to endure the physical and emotional toll associated with starvation is poorly placed to pursue the realisation of other rights).⁴²⁹ Furthermore, the limitations placed on the freedom of speech may render it difficult for people to advance their right of access to housing (i.e. an inability of vulnerable groups to make themselves heard in the appropriate forums will make it near impossible to pursue a vision in which adequate housing will become a reality).⁴³⁰ Nonetheless, there are differences between civil and political rights as compared to socio-economic rights but it is best described as 'a difference in degree rather than in kind'.⁴³¹ In this regard it is clear that socio-economic rights will require additional state action to give effect to them as compared to civil and political rights.⁴³²

The aforementioned insights provided by De Vos are critical in emphasising the importance of public officials attaching similar importance to the realisation of socio-economic rights in comparison to civil and political rights. Thus, the accountability standard that should be adhered to with regards to the safeguarding and advancement of socio-economic rights should (at the very least) be no different from that applicable to those measures implemented for civil and political rights.

⁴²⁷ De Vos 'Pious wishes or directly enforceable human rights?: social and economic rights in South Africa's 1996 constitution' (1997) 13 *SAJHR* 70 (hereafter Pious wishes).

⁴²⁸ De Vos 'Pious wishes' *SAJHR* (1997) 70.

⁴²⁹ De Vos 'Pious wishes' *SAJHR* (1997) 70.

⁴³⁰ De Vos 'Pious wishes' *SAJHR* (1997) 70.

⁴³¹ De Vos 'Pious wishes' *SAJHR* (1997) 70.

⁴³² De Vos 'Pious wishes' *SAJHR* (1997) 70.

I have interpreted the legal source of accountability of the state as flowing principally from the Preamble⁴³³ and sections 1⁴³⁴, 2⁴³⁵, 7(2)⁴³⁶, 8(1)⁴³⁷, 32 (1)(a)⁴³⁸, 195, 196(4)(a)⁴³⁹ and 197(1)⁴⁴⁰ of the Constitution. It is submitted that an in-depth discussion of sections 195 through 197 cannot be undertaken in this multi-disciplinary study due to a restrictive thesis word count. However, an analysis of section 195 is of critical importance as it provides a clear standard with regards to the expected conduct and accountability of public officials.

Section 195 (1) provides that public administration must be governed by the democratic values and principles enshrined in the Constitution, including the following principles:

- (a) A high standard of professional ethics must be promoted and maintained.
- (b) Efficient, economic and effective use of resources must be promoted.
- (c) Public administration must be development-oriented.
- (d) Services must be provided impartially, fairly, equitably and without bias.
- (e) People's needs must be responded to, and the public must be encouraged to participate in policy-making.

⁴³³ The Preamble outlines a vision (in part) as follows: '... Believe that South Africa belongs to all who live in it, united in our diversity...' and '... Improve the quality of life of all citizens and free the potential of each person...'

⁴³⁴ 'The Republic of South Africa is one, sovereign, democratic state founded on the following values: (a) Human dignity, the achievement of equality and the advancement of human rights and freedoms...'

⁴³⁵ 'This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.'

⁴³⁶ 'The state must respect, protect, promote and fulfil the rights in the Bill of Rights.'

⁴³⁷ 'The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state.'

⁴³⁸ 'Everyone has the right of access to any information held by the state;'

⁴³⁹ 196 (4) (a) The powers and functions of the Public Service Commission are to promote the values and principles set out in section 195, throughout the public service.

⁴⁴⁰ 197 (1) Within public administration there is a public service for the Republic, which must function, and be structured, in terms of national legislation, and which must loyally execute the lawful policies of the government of the day.

- (f) Public administration must be accountable.
- (g) Transparency must be fostered by providing the public with timely, accessible and accurate information.
- (h) Good human-resource management and career-development practices, to maximise human potential, must be cultivated.
- (i) Public administration must be broadly representative of the South African people, with employment and personnel management practices based on ability, objectivity, fairness, and the need to redress the imbalances of the past to achieve broad representation.

Section 195 (2) highlights that the above principles apply to:

- (a) administration in every sphere of government;
- (b) organs of state; and
- (c) public enterprises.

It is important to note that section 196, which is concerned with the Public Service Commission, provides at subsection (4) (a) that 'the powers and functions of the Public Service Commission are to promote the values and principles set out in section 195, throughout the public service' as previously detailed. This serves to emphasise the critical role envisaged for section 195 in driving accountability across the public sector in South Africa.

Section 195 will be analysed against the backdrop of scrutinising specific aspects of the *AllPay* and *Black Sash* cases (properly cited and described below). The aforementioned case law provides illuminating insights with regards to the key role that could be played by section 195 in the time to come (in a constitutional democracy) as well as maintaining an unerring focus on Constitutional Court jurisprudence as adopted in this thesis. Furthermore, a clear and persistent focus on specific aspects of the *AllPay* and *Black Sash* cases gives effect to (as well as consolidates) an overarching theme advanced in this thesis in relation to vulnerable groups seeking access to critical services (which should

routinely be provided by an accountable state). Thus, access to social grants (as dealt with in the *AllPay/Black Sash* cases) is explored alongside access to health rights (*Soobramoney* and *TAC*⁴⁴¹ cases as described and analysed in this chapter) as well as access to housing (*Grootboom*⁴⁴² case as described and analysed in this chapter).

In this regard the Court viewed the approximately 15 million people (that relied on the payment of social grants) as vulnerable people that lived 'at the margins of affluence in our society.'⁴⁴³ It should be noted that the South African Social Security Agency ('SASSA') had extended an invitation to bidders to submit proposals (i.e. Request for Proposals) in relation to the payment of social grants on 15 and 17 April 2011.⁴⁴⁴ The Request for Proposals sought to secure a (convenient) payment solution whilst minimising the risk of theft and fraud.⁴⁴⁵ SASSA ultimately concluded a five year contract with Cash Paymaster Services (Pty) Ltd ('CPS') on 3 February 2012 for the payment of social grants.⁴⁴⁶

The Court held that procurement disputes which entail the proper interpretation and application of section 217⁴⁴⁷ of the Constitution 'raise constitutional matters.'⁴⁴⁸ Justice Froneman noted that 'procurement so palpably implicates socio-economic rights that the public has an interest in its being conducted in a fair, equitable, transparent, competitive and cost-effective manner.'⁴⁴⁹ Furthermore, the Court held that the right of

⁴⁴¹ *Minister of Health v Treatment Action Campaign (TAC)* (2002) 5 SA 721 (CC) (hereafter *TAC*).

⁴⁴² *Government of the Republic of South Africa and Others v Grootboom & Others* 2000 (11) BCLR 1169 (CC) (hereafter *Grootboom*).

⁴⁴³ *AllPay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer, South African Social Security Agency* 2014 (1) SA 604 (CC) (hereafter *AllPay1*) para 1.

⁴⁴⁴ *AllPay1* (2014) para 9.

⁴⁴⁵ *AllPay1* (2014) para 9.

⁴⁴⁶ *Black Sash Trust v Minister of Social Development and Others* (2017) ZACC 8 (hereafter *Black Sash*) para 3.

⁴⁴⁷ Section 217 (1) provides that 'When an organ of state in the national, provincial or local sphere of government, or any other institution identified in national legislation, contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective.'

⁴⁴⁸ *AllPay1* (2014) para 4.

⁴⁴⁹ *AllPay1* (2014) para 4.

access to social security for people who are not in a position to support themselves,⁴⁵⁰ especially children,⁴⁵¹ 'is implicated.'⁴⁵²

It should be noted that DCJ Moseneke held in *Steenkamp NO v Provincial Tender Board, Eastern Cape* that:

'Section 217 of the Constitution is the source of the powers and function of a government tender board. It lays down that an organ of State in any of the three spheres of government, if authorised by law may contract for goods and services on behalf of government. However, the tendering system it devises must be fair, equitable, transparent, competitive and cost-effective. This requirement must be understood together with the constitutional precepts on administrative justice in section 33 and the basic values governing public administration in section 195(1).'⁴⁵³

It is submitted that the aforementioned quotation (as supported by Justice Froneman) serves to emphasise the critical role envisaged for section 195 in promoting the accountability of public officials.

The Court held in *AllPay1* that:

'Once a finding of invalidity ... is made, the affected decision or conduct must be declared unlawful and a just and equitable order must be made. It is at this stage that the possible inevitability of a similar outcome, if the decision is retaken, may be one of the factors that will have to be considered. Any contract that flows from the constitutional and statutory procurement framework is concluded not on the state entity's behalf, but on the public's behalf. The interests of those most closely associated with the benefits of that contract must be given due weight. Here it will be

⁴⁵⁰ Section 27 (1) (c) provides that 'Everyone has the right to have access to social security, including, if they are unable to support themselves and their dependents, appropriate social assistance.'

⁴⁵¹ Section 28 (1) (c) provides that 'Every child has the right to basic nutrition, shelter, basic health care services and social services.'

⁴⁵² *AllPay1* (2014) para 4.

⁴⁵³ *Steenkamp NO v Provincial Tender Board, Eastern Cape* [2006] ZACC 16; 2007 (3) SA 121 (CC); 2007 (3) BCLR 300 (CC) paras 20 - 23.

the imperative interests of grant beneficiaries and particularly child grant recipients in an uninterrupted grant system that will play a major role. The rights or expectations of an unsuccessful bidder will have to be assessed in that context.⁴⁵⁴

The Court subsequently held that the award of the tender to CPS, to process the payment of social grants for a period of five years in all nine provinces, was constitutionally invalid.⁴⁵⁵ However, the aforementioned declaration of invalidity was suspended until such time as a just and equitable remedy could be determined.⁴⁵⁶

Justice Froneman highlighted that the current judgment (with reference to *AllPay2*) would contemplate a (suitable) remedy in light of the judgment on the merits in *AllPay 1*.⁴⁵⁷ It should be noted that the declaration of the constitutional invalidity of the tender (as previously outlined in *AllPay1* above) was premised on two grounds.⁴⁵⁸ SASSA had neglected to objectively confirm the empowerment credentials as claimed/provided by CPS.⁴⁵⁹ SASSA had also failed to provide the necessary clarity in the second Bidders Notice as to what exactly was required of bidders (in relation to biometric verification) which ultimately resulted in only one bidder being considered in the second stage of the bidding process.⁴⁶⁰ The Court held that this had rendered the bidding process both uncompetitive and incapable of drawing any meaningful comparisons (between two or more bidders) with regards to cost-effectiveness.⁴⁶¹

⁴⁵⁴ *AllPay1* (2014) para 56.

⁴⁵⁵ *AllPay1* (2014) para 98.

⁴⁵⁶ *AllPay1* (2014) para 98.

⁴⁵⁷ *AllPay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer, South African Social Security Agency* (2014) ZACC 12; 2014 (4) SA 179 (CC) (hereafter *AllPay2*) para 1.

⁴⁵⁸ *AllPay2* (2014) para 1.

⁴⁵⁹ *AllPay2* (2014) para 1.

⁴⁶⁰ *AllPay2* (2014) para 1.

⁴⁶¹ *AllPay2* (2014) para 1.

The Court noted that the Centre of Child Law as *amicus curiae* was keen to draw attention to the interest of the beneficiaries of social grants (especially children) in enjoying uninterrupted payments.⁴⁶² The Court further noted that a significant proportion of social grant beneficiaries are in fact children.⁴⁶³ Consequently, the Court was mindful of the need for a greater level of scrutiny on its part in relation to an assessment of any possible disruption in the payment process where the rights of children are at stake.⁴⁶⁴

The Court highlighted that the cost of running a new tender process could cost between R5 Million and R10 Million but it was necessary to provide the relevant context as it served to highlight that this was a justifiable price to expend (so as to advance the demands of transparency and accountability) in light of the gargantuan (total) cost of social grant payments as well as the possibility of a more cost-effective solution.⁴⁶⁵

The Court drew attention to key constitutional provisions in highlighting that section 195 (1) (d) states that ‘The founding values of our Constitution include a democratic government based on the principles of accountability, responsiveness and openness’ as previously described.⁴⁶⁶ The Court continued by noting that ‘The public administration, which includes organs of state [195 (2) (b)], “must be accountable” [195 (1) (f)], and “transparency must be fostered by providing the public with timely, accessible and accurate information” [195 (1) (g)].’⁴⁶⁷

It should be noted that CPS had argued that sections 27 (1) (c) and 28 (1) (c) do not bind it to the extent that it would be compelled to continue to provide a public service (on behalf of the state) whilst utilising its own

⁴⁶² *AllPay2* (2014) para 27.

⁴⁶³ *AllPay2* (2014) para 36.

⁴⁶⁴ *AllPay2* (2014) para 36.

⁴⁶⁵ *AllPay2* (2014) para 40.

⁴⁶⁶ *AllPay2* (2014) para 50.

⁴⁶⁷ *AllPay2* (2014) para 50.

resources (under terms to which it had not assented).⁴⁶⁸ In this regard the Court held that both SASSA and CPS (in light of the function that CPS performs in giving effect to the country-wide payment of social grants) are organs of state.⁴⁶⁹ The Court consequently held that CPS exercises a public power⁴⁷⁰ and could be viewed as ‘the gatekeeper’ in controlling the access (of the relevant beneficiaries) to social assistance.⁴⁷¹

However, the Court held that ‘SASSA remains accountable to the people of South Africa’ for the performance of the relevant functions by CPS.⁴⁷² The Constitutional Court subsequently suspended the declaration of invalidity in the remedial order in *AllPay2*.⁴⁷³ The aforementioned declaration was premised on SASSA awarding a new five year tender after a robust procurement process or SASSA itself assuming responsibility for the actual payment of the social grants when the suspended contract concluded with CPS would terminate on 31 March 2017.⁴⁷⁴

The Court ordered SASSA to submit reports as to the progress that had been made in devising a new tender process as well as its outcome.⁴⁷⁵ SASSA subsequently furnished the Court with a Report in November 2015 that it had elected on 15 October 2015 not to award a new tender as it would assume responsibility for the actual payment of social grants in due course and that it would in fact do so prior to the deadline of 31 March 2017.⁴⁷⁶ Thus, the Court discharged its supervisory order on 25 November 2015 in light of the aforementioned assurance provided by SASSA.⁴⁷⁷ However, the relevant officials at SASSA had been aware since April 2016 that SASSA would not be in a position to honour the

⁴⁶⁸ *AllPay2* (2014) para 22.

⁴⁶⁹ *AllPay2* (2014) para 52.

⁴⁷⁰ *AllPay2* (2014) para 54.

⁴⁷¹ *AllPay2* (2014) para 55.

⁴⁷² *AllPay2* (2014) para 58.

⁴⁷³ *Black Sash* (2017) para 16.

⁴⁷⁴ *Black Sash* (2017) para 16.

⁴⁷⁵ *Black Sash* (2017) para 18.

⁴⁷⁶ *Black Sash* (2017) para 18.

⁴⁷⁷ *Black Sash* (2017) para 18.

assurance (in being in a position to pay social grants from 1 April 2017) as provided to the Court.⁴⁷⁸ The Minister highlighted that she was only informed of the aforementioned failed undertaking (on the part of SASSA) in October 2016.⁴⁷⁹

The Court made mention of the admission by the executive arm of government of its failure to give effect to its constitutional and statutory obligations in providing for the social assistance of its people.⁴⁸⁰ The Court noted that this was made all the more troubling by the fact that the government had to rely on a private corporate entity with questionable commitment (with specific reference to the transformation of its management structures so as to reflect greater representivity of previously advantaged groups) to extricate itself from this predicament.⁴⁸¹

The Court held that SASSA would not be in a position to assume control for the payment of social grants by 1 April 2017 (nor for a considerable time period after that).⁴⁸² It was consequently the intention of SASSA to conclude a contract with CPS (outside of the competitive tender process as required by section 217 of the Constitution) as a means to facilitate the continued payment of social grants.⁴⁸³ Thus, SASSA had effectively disregarded 'two fundamental pillars' of the remedial order as handed down in *AllPay 2*.⁴⁸⁴ Furthermore, SASSA had broken its promise (as furnished to the Court in November 2015) that it would be in a position to process the actual payments of social grants by 31 March 2017 and in terms of which the Court had elected to withdraw the supervisory order (as previously explained).⁴⁸⁵

The Court held that neither the Minister nor SASSA thought it necessary to inform the Court of the aforementioned setbacks until 28 February

⁴⁷⁸ *Black Sash* (2017) para 6.

⁴⁷⁹ *Black Sash* (2017) para 6.

⁴⁸⁰ *Black Sash* (2017) para 8.

⁴⁸¹ *AllPay1* (2014) para 72.

⁴⁸² *Black Sash* (2017) para 11.

⁴⁸³ *Black Sash* (2017) para 11.

⁴⁸⁴ *Black Sash* (2017) para 11.

⁴⁸⁵ *Black Sash* (2017) para 11.

2017 when SASSA and its CEO lodged an urgent application to secure an order permitting it to take additional steps to secure the payment of social grants from 1 April 2017.⁴⁸⁶ The Court consequently highlighted the need for the Minister and SASSA to publically account for their conduct.⁴⁸⁷ In this regard the Court held that ‘accountability is a central value of the Constitution’.⁴⁸⁸

The Court held that Black Sash had the necessary standing to secure direct access on the grounds of (compelling) public interest.⁴⁸⁹ Justice Froneman provided an illuminating insight in stating that the right to social assistance provided ‘the bare bones of a life of dignity, equality and freedom’ for a multitude of people including children, the elderly and the indigent.⁴⁹⁰

Justice Froneman granted the South African Post Office (‘SAPO’) access as *amicus curiae* as it provided a powerful perspective on the manner in which ‘with sufficient will and energy, the State itself could creditably manage the grants distribution process.’⁴⁹¹ It is submitted that this serves as a fitting reminder of the need for the state to demonstrate the necessary political will in advancing the needs of vulnerable groups (and in so doing embrace accountability for systematically dismantling the wide-ranging deprivation endured by vulnerable groups which is in keeping with the communal obligations’ focus of ubuntu).

The Court highlighted that the overwhelming concern was that the right of millions of people to access social assistance, in terms of section 27 (1) (c), was placed in jeopardy.⁴⁹² The Court held that it was competent to intervene under these and similarly (grave) circumstances⁴⁹³ as articulated by Chief Justice Mogoeng elsewhere as follows:

⁴⁸⁶ *Black Sash* (2017) para 12.

⁴⁸⁷ *Black Sash* (2017) para 14.

⁴⁸⁸ *AAA Investments (Pty) Ltd v Micro Finance Regulatory Council* (2006) ZACC 9; 2007 (1) SA 343 (CC) para 89.

⁴⁸⁹ *Black Sash* (2017) para 36.

⁴⁹⁰ *Black Sash* (2017) para 36.

⁴⁹¹ *Black Sash* (2017) para 39.

⁴⁹² *Black Sash* (2017) para 43.

⁴⁹³ *Black Sash* (2017) para 43.

‘...It is about the upper guardian of our Constitution responding to its core mandate by preserving the integrity of our constitutional democracy...’⁴⁹⁴

The aforementioned insight offered by Chief Justice Mogoeng could be construed as emphasising the critical role of the Constitutional Court in ensuring that the state remains accountable for the pressing needs of vulnerable groups and is censured in those instances where its conduct threatens to undermine constitutionally guaranteed rights.

The Court subsequently explored the (justifiable) supervision of the performance of the contract in light of SASSA’s concrete obligations.⁴⁹⁵ The Court subsequently referred to⁴⁹⁶ the conduct displayed by SASSA in *AllPay2* as follows:

‘Before concluding, it is necessary to say something about SASSA’s conduct. SASSA is an organ of state. It is bound to the basic values and principles governing public administration set out in section 195 of the Constitution. As is evident from this judgment, and the merits judgment, SASSA’s irregular conduct has been the sole cause for the declaration of invalidity and for the setting aside of the contract between it and Cash Paymaster.’⁴⁹⁷

‘This Court sought further submissions from the parties to assist in the difficult task of determining appropriate relief. The importance of this is obvious, not only because of the vast sums of money involved but more importantly, because of the enormous consequences of irregularities where the interests of beneficiaries, particularly children, play a pivotal role in assessing the appropriate remedy.’⁴⁹⁸

⁴⁹⁴ *Electoral Commission v Mhlope* (2016) ZACC 15; 2016 (5) SA 1 (CC) para 137.

⁴⁹⁵ *Black Sash* (2017) para 55.

⁴⁹⁶ *Black Sash* (2017) para 56.

⁴⁹⁷ *AllPay2* (2014) para 73.

⁴⁹⁸ *AllPay2* (2014) para 74.

‘Yet, contrary to the obligations it carries under section 195, SASSA has adopted an unhelpful and almost obstructionist stance. It failed to furnish crucial information to AllPay regarding the implementation of the tender and to Corruption Watch in respect of steps it took to investigate irregularities in the bid and decision-making processes. Its conduct must be deprecated, particularly in view of the important role it plays as guardian of the right to social security and as controller of beneficiaries’ access to social assistance.’⁴⁹⁹

The aforementioned passages, as quoted by the Court in *Black Sash*, serve to confirm the critical role of section 195 in shaping the conduct of public officials/organs of state so as to give effect to their duties in a manner which will advance constitutionally guaranteed rights.

Justice Froneman noted the clear inability of SASSA to discharge its duties with regards to the performance of the contract, a transparent bidding process and developing the necessary expertise in-house to process the payment of social grants.⁵⁰⁰ Furthermore, the Court noted that the aforementioned conduct of SASSA demanded ‘explanation and accountability’.⁵⁰¹

The Court expressed its displeasure with the conduct of the Minister and SASSA who had utilised the discharge of the supervisory order as previously issued by the Court as justification for not approaching/informing the Court that it would not be in a position to pay the social grants itself as per its previous assurance.⁵⁰² The Court held that the material component of the court order remained even though the supervisory component of the same order had been discharged.⁵⁰³ Thus, SASSA was confined to two specific options in either facilitating

⁴⁹⁹ *AllPay2* (2014) para 75.

⁵⁰⁰ *Black Sash* (2017) para 57.

⁵⁰¹ *Black Sash* (2017) para 58.

⁵⁰² *Black Sash* (2017) para 59.

⁵⁰³ *Black Sash* (2017) para 60.

the payment of social grants by devising a competitive tendering process or processing the payments of social grants in-house after 31 March 2017.⁵⁰⁴ Thus, SASSA was in breach of the Court's remedial order when it became aware that it could not pursue either of the aforementioned options and in fact contemplated giving effect to steps outside of the aforementioned two options.⁵⁰⁵

Justice Froneman noted that there was no obstacle (legal or otherwise) that prevented the Minister and SASSA from engaging with the Court.⁵⁰⁶ This is despite the fact that both the Minister and SASSA had the necessary knowledge that compliance with the court order was not possible from end August to about October 2016.⁵⁰⁷ The Court noted that the aforementioned inability to safeguard the protection of access of grant recipients to continued social assistance justified supervision by the Court.⁵⁰⁸ However, the Court held that more was required (over and above the aforementioned supervision of SASSA) in light of supervision alone not serving to persuade SASSA to give effect to its constitutional mandate.⁵⁰⁹

The Court held that the Auditor-General could be viewed as 'a possible independent monitor' to assist the Court.⁵¹⁰ In this regard the Auditor General is permitted to 'audit and report on the accounts, financial statements and financial management of any institution that is authorised in terms of any law to receive money for a public purpose' in terms of section 188 (2) (b) of the Constitution.⁵¹¹ The Court confirmed that CPS is in fact such an institution (in light of the function served by CPS in paying social grants (as previously discussed)).⁵¹²

⁵⁰⁴ *Black Sash* (2017) para 60.

⁵⁰⁵ *Black Sash* (2017) para 60.

⁵⁰⁶ *Black Sash* (2017) para 61.

⁵⁰⁷ *Black Sash* (2017) para 61.

⁵⁰⁸ *Black Sash* (2017) para 62.

⁵⁰⁹ *Black Sash* (2017) para 62.

⁵¹⁰ *Black Sash* (2017) para 69.

⁵¹¹ *Black Sash* (2017) para 69.

⁵¹² *Black Sash* (2017) para 69.

The Court subsequently declared that the Minister and SASSA are liable for costs in their official capacity but felt compelled to devise an order that would explore whether individual conduct materially contributed to the current state of affairs.⁵¹³ However, the Court held that it could only scrutinise the conduct of affected parties if they are joined to the proceedings in their personal capacities so as to provide them with a suitable platform to explain/defend their conduct (and in so doing avoid an adverse costs order in their personal capacity).⁵¹⁴ The hardened stance adopted by the Court, with regards to exploring individual cost orders against public officials that display gross negligence and/or *mala fides*, is welcomed as a mechanism to demand that public officials maintain a suitable standard in meeting the needs of vulnerable groups.

The Court held that the Minister, in holding executive political office, was ultimately responsible for the crisis and had to account to Parliament in terms of section 55⁵¹⁵ of the Constitution.⁵¹⁶ The order⁵¹⁷ by the Court is lengthy but it is critical to note that the Court demonstrates a robust and expansive approach in relation to supervising the conduct of CPS, the Minister and SASSA [as a means to safeguard the right of access to social assistance in terms section 27 (1) (c)]. It is submitted that the Court placed reliance on Section 195 to highlight the manner in which the conduct of SASSA and the Minister had failed to meet the expected standard in giving effect to the duties owed to vulnerable people in terms of constitutionally guaranteed rights.

The insights offered below, with reference to present day developments in the social grants payment debacle, serve to demonstrate that the conduct of SASSA and the Minister needs to be subjected to ongoing scrutiny by the Court. In this regard the current newspaper reports demonstrate a persistent and alarming lack of accountability on the part

⁵¹³ *Black Sash* (2017) para 72.

⁵¹⁴ *Black Sash* (2017) para 75.

⁵¹⁵ Section 55 provides that the National Assembly must provide for mechanisms to ensure that organs of state in the national sphere of government are accountable to it and maintain oversight over any organ of state.

⁵¹⁶ *Black Sash* (2017) para 74.

⁵¹⁷ *Black Sash* (2017) para 76.

of the Minister and SASSA in relation to giving effect to the relevant Court orders as well as meeting the critical needs of vulnerable people.

The current situation (as described below) highlights the importance of utilising section 195 to drive the accountability of public officials/organs of state. In this regard sections 195 (1) (a), 195 (1) (b) and 195 (1) (f) are especially critical in light of the controversy in which the Minister and SASSA are currently mired. The alarm was raised that social grant payments to 17 million beneficiaries was destined for another crisis as SASSA had made no discernible progress in securing the services of a new entity to distribute the aforementioned grants (in giving effect to the Constitutional Court ruling that a new services provider should be in place by 1 April 2018).⁵¹⁸ It was of concern that Minister Bathabile Dlamini had elected not to appear nor account at the last two sittings of the Social Development Portfolio Committee.⁵¹⁹ Furthermore, the panel of experts appointed by the Constitutional Court (to provide oversight with regards to the phasing out of the services rendered by CPS) had expressed the view that SASSA had wilfully ignored their requests for information/documentation.⁵²⁰ Furthermore, Minister Dlamini had been accused of ‘manufacturing a crisis’ by issuing a statement on 30 October 2017 that SAPO was not capable of offering a comprehensive social grants payment solution as a means of ensuring that CPS would remain the service provider of choice.⁵²¹

It should be noted that the Chief Executive of SAPO, Mark Barnes, vigorously disputed the claims by Minister Dlamini (as to the inability of SAPO to provide a comprehensive social grants payment solution) by referring to an independent assessment by CSIR in which SAPO had

⁵¹⁸ Maqhina M ‘Grants for 17m still not assured - minister faces serious grilling over “manufactured crisis”’ *Cape Argus* 31 October 2017 1.

⁵¹⁹ Maqhina M ‘Grants for 17m still not assured - minister faces serious grilling over “manufactured crisis”’ *Cape Argus* 31 October 2017 1.

⁵²⁰ Maqhina M ‘Grants for 17m still not assured - minister faces serious grilling over “manufactured crisis”’ *Cape Argus* 31 October 2017 1.

⁵²¹ Maqhina M ‘Grants for 17m still not assured - minister faces serious grilling over “manufactured crisis”’ *Cape Argus* 31 October 2017 1.

yielded a 97% pass rate across 218 performance categories.⁵²² Furthermore, Members of Parliament in the Standing Committee on Public Accounts ('SCOPA') and the Social Development Portfolio Committee had expressed dismay at their meeting on 31 October 2017 (at which Minister Dlamini had in fact been in attendance) in that SAPO and SASSA had yet to conclude an agreement despite the fact that just 5 months remained on the contract with CPS.⁵²³

It should be noted that the Director-General at National Treasury, Dondo Mohajane, had briefed SCOPA/Social Development Portfolio Committee on 31 October 2017 that he had facilitated 4 meetings between SASSA and SAPO in an attempt to break the deadlock.⁵²⁴ Furthermore, it emerged at the same meeting that SAPO had only just been provided with the information as to why it was supposedly not able to provide the social grants payment service on behalf of SASSA.⁵²⁵ Mohajane also expressed the view that there was no comprehensive guidance from the relevant (two) cabinet ministers to inform the work of the respective negotiation teams of SASSA and SAPO.⁵²⁶

The abovementioned theme (with regards to the 'manufacturing of a crisis' by the Minister) was explored further in light of the fact that the Minister would seek to initiate a new tender process in claiming that SAPO was not capable of providing a comprehensive social grants payment solution.⁵²⁷ The winners of a new tender would likely be confirmed only in March 2018 - this would result in 'a hybrid system' in which the winning bidder in the tender process would not be in a position to take over social grant payments prior to the contract of CPS drawing

⁵²² African News Agency 'Dlamini ordered to break deadlock - CSIR found Sapo competent to deliver grants' *Cape Argus* 1 November 2017 4.

⁵²³ African News Agency 'Dlamini ordered to break deadlock - CSIR found Sapo competent to deliver grants' *Cape Argus* 1 November 2017 4.

⁵²⁴ African News Agency 'Treasury to smooth the way for SAPO' *Cape Times* 2 November 2017 1.

⁵²⁵ African News Agency 'Treasury to smooth the way for SAPO' *Cape Times* 2 November 2017 1.

⁵²⁶ African News Agency 'Treasury to smooth the way for SAPO' *Cape Times* 2 November 2017 1.

⁵²⁷ Editorial Opinion 'Battle of the Grant' *Cape Argus* 2 November 2017 10.

to a close.⁵²⁸ It was noted (with concern) that Minister Dlamini remained 'unwilling or unable to make any real effort to remove CPS from the highly lucrative tender'.⁵²⁹ Consequently, the state should accept the fact that 'society will return to the courts to have them govern by default because the government is derelict in its duties'.⁵³⁰

Jeff Radebe, the chairperson of the Inter-Ministerial Committee on comprehensive social security, highlighted that all co-operation agreements between SAPO and SASSA would be concluded by 17 November 2017.⁵³¹ However, the details of the aforementioned co-operation agreements are yet to be finalised and the hybrid model (as proposed by Treasury to include all banks and SAPO in effecting social grant payments) is yet to be considered.⁵³²

The concern was once again raised that no mention was made of the entity/service provider that would be responsible for the production of new cards, banking services and the cash distribution of grants which would be required as part of the hybrid social grants scheme.⁵³³ In this regard the editorial comment highlighted that 'it is time for this ridiculous display of incompetency to be brought to a halt – beginning with the sacking of Bathabile Dlamini'.⁵³⁴ It is difficult to find fault with the call raised in the aforementioned editorial piece as Minister Bathabile and SASSA have failed to take any decisive steps in the past 8 months to give effect to the terms of the latest Constitutional Court ruling. It is submitted that there is likely to be significant political fallout in the next while in the lead up to the Constitutional Court deadline which serves to

⁵²⁸ Editorial Opinion 'Battle of the Grant' *Cape Argus* 2 November 2017 10.

⁵²⁹ Editorial Opinion 'Battle of the Grant' *Cape Argus* 2 November 2017 10.

⁵³⁰ Editorial Opinion 'Battle of the Grant' *Cape Argus* 2 November 2017 10.

⁵³¹ Maqhina M 'SASSA and SAPO given deadline to co-operate - Inter-Ministerial team steers process to meet Constitutional Court orders' *Cape Argus* 9 November 2017 5.

⁵³² Maqhina M 'SASSA and SAPO given deadline to co-operate - Inter-Ministerial team steers process to meet Constitutional Court orders' *Cape Argus* 9 November 2017 5.

⁵³³ Editorial Opinion 'Fire the minister' *Cape Argus* 9 November 2017 10.

⁵³⁴ Editorial Opinion 'Fire the minister' *Cape Argus* 9 November 2017 10.

emphasise the need to demand a clear standard of accountability on the part of public officials as provided for in terms of section 195.⁵³⁵

It should be noted that the previous commentary, in relation to the dereliction of duty displayed by the Minister and SASSA, serves to emphasise the key role to be played by the Constitutional Court in enforcing the obligations of the state with reference to section 195 and other relevant provisions of the Constitution as previously detailed. In this regard it is indeed a positive sign to note that President Ramaphosa highlighted the following as part of his State of the Nation address on 16 February 2018:

‘Social grants remain a vital lifeline for millions of our people living in poverty. We will urgently take decisive steps to comply with all directions of the Constitutional Court. I want to personally allay fears of any disruption to the efficient delivery of this critical service, and will take action to ensure no person in government is undermining implementation deadlines set by the court.’⁵³⁶

It is submitted that the sentiments expressed by President Ramaphosa are laudable and the hope is that the relevant public officials do in fact embrace a better way of doing things so as to alleviate the suffering of vulnerable groups. It is further submitted that public officials that embrace the communal obligations’ focus of ubuntu (as advanced in this thesis) will contribute to the creation of a community/nation-state in which all people will be treated as having equal worth as previously explained. This should be contrasted with the application of section 195 which at its core demands that public officials are ethical and forge an accountable public administration so as to faithfully serve the needs of the public. Consequently, it is my firm submission that the communal obligations’ focus of ubuntu can mesh with section 195 (as well as an

⁵³⁵ Please note that present day developments in relation to the social grant payments debacle is correct up to and including 9 November 2017 (but for a brief reference to the State of the Nation address on 16 February 2019 as detailed below).

⁵³⁶ <http://www.news24.com/SouthAfrica/News/full-text-now-is-the-time-to-lend-a-hand-says-president-cyril-ramaphosa-in-inaugural-sona2018-speech-20180216>, (accessed on 16 February 2018).

individual human rights regime as previously explained) in shaping ethical and accountable public officials that unfalteringly strive to create a nation-state in which all people can live lives of purpose.

The Constitution provides that a court must consider international law when interpreting rights which will indeed assist in the realisation of socio-economic rights.⁵³⁷ This is in keeping with the international law obligations of South Africa.⁵³⁸ In addition, the Constitutional Court, tasked with providing the seminal interpretation of the Constitution with reference to section 167(3),⁵³⁹ is ultimately responsible for providing insight as to the obligations flowing from enshrined constitutional rights.⁵⁴⁰ Bilchitz notes that the minimum core is defined in terms of minimal interests which we all share but vulnerable people are unable to attain those same interests and consequently require assistance by the state.⁵⁴¹

It is of paramount importance to develop definitive insight as to the positioning of the Constitution in our troubled history as well as the nature and extent of the rights that are safeguarded in the Constitution.⁵⁴² In this regard De Vos believes that there is significant academic support for the idea advanced by Klare that South Africa's Constitution can be viewed as setting up 'a project of transformative constitutionalism'.⁵⁴³ The aforementioned project serves as a comprehensive rejection of the fiction shaped by liberal constitutionalism in which the political community is fixed.⁵⁴⁴ Thus, little or no attention is paid to the political, social and economic context within which a Constitution was established nor accommodating the fact that the context will change over time.⁵⁴⁵ De Vos is correct in stating that the

⁵³⁷ Section 39(1)(b) of the Constitution of the Republic of South Africa, 1996.

⁵³⁸ Please see Section 3.4 regarding the International Covenant ('ICESCR').

⁵³⁹ Section 167 (3) of the Constitution of the Republic of South Africa, 1996.

⁵⁴⁰ Bilchitz D *Poverty and Fundamental Rights* (2007) 197.

⁵⁴¹ Bilchitz D *Poverty and Fundamental Rights* (2007) 199.

⁵⁴² De Vos P 'Grootboom' *SAJHR* (2001) 260.

⁵⁴³ Klare K 'Legal Culture and Transformative Constitutionalism' 14 *SAJHR* 146 (1998) 155.

⁵⁴⁴ De Vos P 'Grootboom' *SAJHR* (2001) 260.

⁵⁴⁵ De Vos P 'Grootboom' *SAJHR* (2001) 260

1996 South African Constitution is far removed from the aforementioned political fiction as the South African Constitution is premised on actively engaging with the past (which laid the groundwork for its adoption) as well as the future which it seeks to shape in part.⁵⁴⁶ Furthermore, the South African Constitution can be viewed as giving rise to a constitutional vision styled as a 'long-term project of constitutional enactment, interpretation and enforcement' which is committed to shaping South Africa's 'political and social institutions and power relationships in a democratic, participatory, and egalitarian direction'.⁵⁴⁷ Thus, the Constitution issues an unequivocal rejection of the social and economic status quo and strives to give effect to one of its core aims to transform society into a more just and fair place in which people would be better placed to reach their full potential as human beings.⁵⁴⁸

This is consistent with Brand's belief that the full justiciability of socio-economic rights (as entrenched in the South African Constitution) is a critical and radical innovation and that it played a pivotal role in moving Klare to embrace a 'post-Liberal' reading of the Constitution which 'in sharp contrast to the classic liberal documents (the South African Constitution) is social, redistributive, caring, positive, at least partly horizontal, participatory, multicultural, and self-conscious about its historical setting and transformative role and mission'.⁵⁴⁹ Furthermore, the South African Constitution seeks to both protect as well as transform and the Constitution consequently 'embraces a vision of collective self-determination parallel to (not in place of) its strong vision of individual self-determination'.⁵⁵⁰

It is implicit, in a transformative reading of the Constitution, that the state is burdened with both negative and positive obligations and how these

⁵⁴⁶ De Vos P 'Grootboom' *SAJHR* (2001) 260.

⁵⁴⁷ De Vos P 'Grootboom' *SAJHR* (2001) 260.

⁵⁴⁸ De Vos P 'Grootboom' *SAJHR* (2001) 260.

⁵⁴⁹ Brand D 'The proceduralisation of South African socio-economic rights jurisprudence, or 'what are socio-economic rights for?' in Botha H & Van Der Walt A & Van Der Walt J (eds) *Rights and Democracy in a Transformative Constitution* (2003) 52 (hereafter What are socio-economic rights for?).

⁵⁵⁰ Brand D 'What are socio-economic rights for?' (2003) 52.

same obligations 'might have to be reconciled with one another within a specific context'.⁵⁵¹ The contextual interpretation of rights demands the contemplation of two types of context.⁵⁵² Firstly, a considered analysis of the relevant Chapter and the Constitution as a whole (as well as the scope and meaning of the rights enshrined in the Constitution) which may only be ascertained against the backdrop of the social and historical context of the country.⁵⁵³ The text contained in the various provisions of the Bill of Rights is deemed to burden the state with both negative and positive duties (as previously stated) and a fitting example in this regard is section 7 which obliges the state not only to respect the various rights but also to protect, promote and fulfil those same rights.⁵⁵⁴ Thus, it is incumbent upon the state to progressively give effect to all rights as it is apparent that rights do not present 'as pre-existing entitlements that are activated as soon as a justiciable Bill of Rights' is established.⁵⁵⁵ The state has a constitutional obligation to progressively pursue 'rights-based goals' even though De Vos acknowledges the difficulty (even impossibility) of the task ahead.⁵⁵⁶

Shue is commonly credited as having first conceptualised a multiple obligations structure applicable to all human rights.⁵⁵⁷ De Vos, with reference to the aforementioned contribution by Shue, believes that the (primary) duty to respect human rights is easiest to comprehend as it dovetails with the conservative view that the nature of a Bill of Rights should serve 'as a shield against government interference'.⁵⁵⁸ There is a secondary duty on the part of the state to protect citizens against political/economic/social acts of exploitation.⁵⁵⁹ Thus, the state is burdened with a positive obligation to safeguard the specified rights from

⁵⁵¹ De Vos P 'Grootboom' *SAJHR* (2001) 261.

⁵⁵² De Vos P 'Grootboom' *SAJHR* (2001) 261.

⁵⁵³ De Vos P 'Grootboom' *SAJHR* (2001) 261.

⁵⁵⁴ De Vos P 'Grootboom' *SAJHR* (2001) 261.

⁵⁵⁵ De Vos P 'Grootboom' *SAJHR* (2001) 261.

⁵⁵⁶ De Vos P 'Grootboom' *SAJHR* (2001) 261.

⁵⁵⁷ Shue H *Basic Rights: Subsistence, Affluence and US Foreign Policy* (1980).

⁵⁵⁸ De Vos P 'The economic and social rights of children and South Africa's transitional Constitution' (1995) 10 *SAPR/PL* 245 (hereafter Economic and social rights of children).

⁵⁵⁹ De Vos P 'Economic and social rights of children' (1995) 10 *SAPR/PL* 246.

being infringed by private parties.⁵⁶⁰ Also, there is a tertiary obligation on the part of the state to assist and fulfil human rights (whether it be civil, political and/or socio-economic rights).⁵⁶¹ This implies that the beneficiary has a right to expect positive action on the part of the state.⁵⁶² It should be noted that the 'duty to promote' is at times viewed as a dimension of the duty to fulfil socio-economic rights and it encompasses raising awareness and educational initiatives concerning those same rights.⁵⁶³ It is critical to note that when civil and political rights are categorised as precise (and their enforcement is deemed to pose no difficulty) commentators are as a rule focussed on the first level of obligations.⁵⁶⁴ However, when socio-economic rights are viewed as imprecise and unenforceable, commentators are as a rule focussed on the imprecise tertiary level of obligations.⁵⁶⁵

De Vos believes that the manner in which the equality clause as well as various socio-economic rights are defined firmly point to the transformative nature of the various rights in the Bill of Rights.⁵⁶⁶ It should be noted that even though section 9 (2) provides for equality before the law [section 9 (1)] and the prohibition of unfair discrimination [section 9 (3)] this will not inevitably (nor swiftly) lead to securing 'real' equality in our society.⁵⁶⁷ Thus, the state could elect (or could in fact be constitutionally mandated) to implement measures that will bring about 'real' equality (i.e. as related to the concept of substantive equality) in the long term.⁵⁶⁸ Furthermore, the Constitutional Court has highlighted the importance of the careful consideration of the historical, social and economic context when interpreting the provisions of the Bill of Rights.⁵⁶⁹

⁵⁶⁰ De Vos P 'Economic and social rights of children' (1995) 10 *SAPR/PL* 246.

⁵⁶¹ De Vos P 'Economic and social rights of children' (1995) 10 *SAPR/PL* 247.

⁵⁶² De Vos P 'Economic and social rights of children' (1995) 10 *SAPR/PL* 247.

⁵⁶³ Liebenberg S 'Interpretation of socio-economic rights' (2003) Section 33.2.

⁵⁶⁴ De Vos P 'Economic and social rights of children' (1995) 10 *SAPR/PL* 250.

⁵⁶⁵ De Vos P 'Economic and social rights of children' (1995) 10 *SAPR/PL* 250.

⁵⁶⁶ De Vos P 'Grootboom' *SAJHR* (2001) 262.

⁵⁶⁷ De Vos P 'Grootboom' *SAJHR* (2001) 262.

⁵⁶⁸ De Vos P 'Grootboom' *SAJHR* (2001) 262.

⁵⁶⁹ Please see *Grootboom* (2000) para 25. Please also see *S v Zuma* 1995 (2) SA 642 (CC) para 15 and *Makwanyane* (1995) at paras 39 and 264.

Consequently, an understanding of the historical context (which ushered in the new constitutional dispensation) is a critical component in developing a nuanced understanding of the various rights in the Bill of Rights.⁵⁷⁰ Thus, the legacy of apartheid looms large in seeking to not only bring about political transformation (as evidenced by an open and democratic society) but also to provide for social and economic transformation as a means to give effect to the key values of freedom, dignity and equality in a contemporary South Africa.⁵⁷¹ Furthermore, the dire social and economic conditions prevalent in South Africa serve as the backdrop for a nuanced perspective of the Bill of Rights in that there are 'great and unacceptable discrepancies in wealth in the country'.⁵⁷² It follows that the Bill of Rights has to be interpreted in a manner which will bring about economic transformation.⁵⁷³ This will in turn give effect to the vision of the Constitution to transform society so as to ensure that all South Africans can lead a dignified existence and strive to realise their full potential.⁵⁷⁴

It should be noted that section 172 (1) (b) empowers the court when deliberating on a constitutional matter within its power, which includes any issue involving the interpretation, protection or enforcement of the Constitution in terms of section 167 (7), to make any order that is just and equitable.⁵⁷⁵ In addition, section 38 stipulates that, whenever a fundamental right has been threatened or violated, the Constitutional Court may provide any 'appropriate relief.'⁵⁷⁶ Thus, it follows that the Constitutional Court has remarkable latitude in selecting a remedy (in any case where a fundamental right has been threatened or violated) so long as that remedy is just, equitable and appropriate.⁵⁷⁷

⁵⁷⁰ De Vos P 'Grootboom' *SAJHR* (2001) 263.

⁵⁷¹ De Vos P 'Grootboom' *SAJHR* (2001) 263.

⁵⁷² *Soobramoney* (1998) para 8. Please also see *Azapo* (1995) para 43.

⁵⁷³ De Vos P 'Grootboom' *SAJHR* (2001) 263.

⁵⁷⁴ De Vos P 'Grootboom' *SAJHR* (2001) 263.

⁵⁷⁵ Constitution of the Republic of South Africa, 1996.

⁵⁷⁶ Liebenberg S 'Editorial' (1999) 1 *ESR Review*.

⁵⁷⁷ Liebenberg S 'Editorial' (1999) 1 *ESR Review*.

A society is ultimately tasked with bearing the obligations that flow from conditional rights even though pinpointing the specific obligations cannot be inferred directly from the conditional rights.⁵⁷⁸ In this regard Bilchitz has stated that:

‘The notion of a society has been used as a shorthand expression for the primary collective political grouping that designs, forms and enforces rules which govern the distribution of benefits and burdens to individuals and thus largely determines the ability of individuals to lead lives of value... It is recognised that there are collective groupings beyond the nation state with the power to formulate and enforce rules that impact significantly upon individuals. It is thus also an important project to consider responsibilities beyond the nation state’.⁵⁷⁹

Thus, the aforementioned collective groupings (beyond the nation-state) will be explored in part through a discussion of ‘semi-autonomous fields’ as proposed by the anthropologist, Sally Falk Moore.⁵⁸⁰

Furthermore, the right to housing as well as the rights to health care, food, water and social services provide ‘rights of access to the social and economic entitlements’ which serves to confirm that the duty of the state is limited.⁵⁸¹ Consequently, the limit of the obligation borne by the state is illustrated by De Vos by citing an example in which the state would not be under a duty ‘to provide individuals with free housing’ but could ostensibly be compelled to provide its citizens with adequate access to secure housing.⁵⁸² Also, the constitutional analysis of the Bill of Rights normally has two stages - the applicant will need to demonstrate that the specific duty to respect, protect, promote or fulfil the obligation flowing from a right in the Bill of Rights has not been honoured after which the party seeking to uphold the restriction will need to advance persuasive

⁵⁷⁸ Bilchitz D *Poverty and Fundamental Rights* (2007) 92.

⁵⁷⁹ Bilchitz D *Poverty and Fundamental Rights* (2007) 92 (with specific reference to footnote 43 on the aforementioned page).

⁵⁸⁰ Please see Section 5.4.

⁵⁸¹ De Vos P ‘Pious wishes’ *SAJHR* (1997) 87.

⁵⁸² De Vos P ‘Pious wishes’ *SAJHR* (1997) 87.

reasons as to why the restriction is justified.⁵⁸³ This second stage allows for obligations flowing from specific rights to be legitimately limited by virtue of the general limitations clause in section 36 of the Constitution.⁵⁸⁴ In addition, the insertion of 'internal limitations clauses' in the Bill of Rights is viewed as an admission that the state is neither capable of realising all of the rights fully nor immediately.⁵⁸⁵ However, the Final Constitution and the ICESCR adopt a similar stance in providing that clear obligations flow from rights even when those same rights are subject to progressive realisation.⁵⁸⁶

3.3.1 The monitoring and enforcement of the progressive realisation of socio-economic rights

I am in agreement with De Vos that an effective monitoring system is critical so as to ensure that the state makes significant strides in realising socio-economic rights in the shortest possible time.⁵⁸⁷ Furthermore, the Constitution compels the South African Human Rights Commission ('SAHRC') to demand reports from the relevant organs of state so as to assess the implementation of the various socio-economic rights.⁵⁸⁸

There is a clear need to devise 'specific, quantifiable and achievable targets, by agreement or negotiation'.⁵⁸⁹ The attainment of the aforementioned measurable goals should be monitored by the SAHRC which in turn reports to Parliament and the public.⁵⁹⁰ Budlender offers a critical insight in agitating for 'systematic monitoring of outputs and outcomes' rather than whether, in general, rights are being promoted.⁵⁹¹ This clearly demonstrates the need to monitor 'the mainstreaming of

⁵⁸³ De Vos P 'Pious wishes' *SAJHR* (1997) 92.

⁵⁸⁴ De Vos P 'Pious wishes' *SAJHR* (1997) 92.

⁵⁸⁵ De Vos P 'Pious wishes' *SAJHR* (1997) 93.

⁵⁸⁶ De Vos P 'Pious wishes' *SAJHR* (1997) 93. Please see General Comment No. 3: The Nature of States Parties' Obligations (Art. 2, Para. 1, of the Covenant), <http://www.refworld.org/docid/4538838e10.html>, (accessed 1 August 2016).

⁵⁸⁷ De Vos P 'Pious wishes' *SAJHR* (1997) 99.

⁵⁸⁸ Section 184 (3) of the Constitution of the Republic of South Africa, 1996.

⁵⁸⁹ Budlender G 'Socio-economic rights in the new millennium-the challenges of implementation in SA' 1 *ESR Review* (1999) (hereafter Socio-economic rights).

⁵⁹⁰ Budlender G 'Socio-economic rights' 1 *ESR Review* (1999).

⁵⁹¹ Budlender G 'Socio-economic rights' 1 *ESR Review* (1999).

social and economic rights in policy and legislation' rather than a single-minded focus on instances of abuse.⁵⁹² Furthermore, the role of the SAHRC should not be confined to that of 'a conduit of information' but should also aim to analyse and assess whether the measures adopted by the relevant organs of state are effective in advancing socio-economic rights.⁵⁹³ The SAHRC is viewed as having a critical role to play in forging the core content of socio-economic rights as this is deemed essential to effectively monitor and enforce socio-economic rights.⁵⁹⁴ The reality is that the organs of state cannot be held fully accountable (for not discharging their constitutional obligations as related to socio-economic rights) in the absence of clear goals and benchmarks.⁵⁹⁵ Thus, the SAHRC and the Commission for Gender Equality should collaborate in an effective manner so as to ensure that gender-related factors are an integral component in the monitoring of socio-economic rights.⁵⁹⁶

Furthermore, the SAHRC and the Commission on Gender Equality have a critical role to play in monitoring the progressive realisation of economic, social and cultural rights, providing the state with recommendations as and when required and engaging with civil society in the preparation of South Africa's reports to the UN Committee.⁵⁹⁷ It follows that both the Commission on Gender Equality and the SAHRC should have an unwavering focus on giving practical effect to 'the principle of indivisibility and interdependence of all human rights' which is in keeping with contemporary trends in international human rights law.⁵⁹⁸ It should be noted that 'a process-requirement remains for the state to monitor the extent of non-realisation' as well as formulate suitable 'remedial strategies and programmes' even in those instances

⁵⁹² Budlender G 'Socio-economic rights' 1 *ESR Review* (1999).

⁵⁹³ Kollapen J 'Monitoring Socio- Economic Rights: What has the SA Human Rights Commission done?' (1999) 1 *ESR Review* (1999) (hereafter What has the SAHRC done?).

⁵⁹⁴ Kollapen J 'What has the SAHRC done?' (1999) 1 *ESR Review* (1999).

⁵⁹⁵ Kollapen J 'What has the SAHRC done?' (1999) 1 *ESR Review* (1999).

⁵⁹⁶ Liebenberg S 'Interpretation of socio-economic rights' (2003) Section 33.13.

⁵⁹⁷ Liebenberg S 'The International Covenant on Economic, Social and Cultural Rights and its implications for South Africa' *SAJHR* (1995) 374 (hereafter The international covenant).

⁵⁹⁸ Liebenberg S 'The international covenant' *SAJHR* (1995) 374.

where the available resources of the State Party are clearly insufficient to achieve the desired standard in relation to the realisation of rights.⁵⁹⁹

Also, Kollapen describes the outcomes of the monitoring process which the SAHRC should strive to achieve in that the state should embrace a nuanced understanding of respecting and advancing socio-economic rights through its reflection in policy, legislation, programmes and budgetary processes.⁶⁰⁰ Kollapen is correct in stating that proper accountability will be ensured through striving to reach consensus as to the core normative content of socio-economic rights in addition to the clear standards/benchmarks for measuring the progressive realisation of rights.⁶⁰¹ Also, active participation by NGOs is indeed critical in the monitoring and enforcement of socio-economic rights.⁶⁰²

Liebenberg also believes that the SAHRC can play a pivotal supportive role in the judicial enforcement of socio-economic rights.⁶⁰³ There have only been a limited number of socio-economic rights cases heard in the Constitutional Court which bolsters her belief in the need for an institution such as the SAHRC to be actively engaged in the promotion and safeguarding of socio-economic rights.⁶⁰⁴ Thus, the information generated through the monitoring process and the annual assessment of the specific progress of relevant organs of state (in discharging their obligations relating to the realisation of socio-economic rights) should assist in the selection of appropriate cases for litigation.⁶⁰⁵ Liebenberg believes that there is indeed an opportunity to forge a co-operative relationship between the SAHRC and the courts in the enforcement of

⁵⁹⁹ Liebenberg S 'The international covenant' *SAJHR* (1995) 366.

⁶⁰⁰ Kollapen J 'What has the SAHRC done?' (1999) 1 *ESR Review* (1999).

⁶⁰¹ Kollapen J 'What has the SAHRC done?' (1999) 1 *ESR Review* (1999).

⁶⁰² Kollapen J 'What has the SAHRC done?' (1999) 1 *ESR Review* (1999).

⁶⁰³ Liebenberg S 'Interpretation of socio-economic rights' (2003) (Section 33.13) 1. Please find additional information as to the nature and extent of the constitutional mandate of the SAHRC at <https://www.sahrc.org.za/index.php/about-us/about-the-sahrc>, (accessed 13 January 2018).

⁶⁰⁴ Liebenberg S 'Interpretation of socio-economic rights' (2003) (Section 33.13) 1. In this regard Liebenberg is referring to *Soobramoney* (1998), *Grootboom* (2000) and *TAC* (2002).

⁶⁰⁵ Liebenberg S 'Interpretation of socio-economic rights' (2003) (Section 33.13) 1.

orders relating to the realisation of socio-economic rights.⁶⁰⁶ Thus, the courts should seek to involve the SAHRC in the supervision and enforcement of their decisions/orders involving socio-economic rights.⁶⁰⁷ Also, the SAHRC can bring widespread violations of socio-economic rights to the attention of the public and the state without always having to resort to litigation.⁶⁰⁸ Furthermore, the SAHRC can develop an understanding of the impact of government programmes on vulnerable communities (and whether those programmes are being reasonably implemented) by involving both government officials and civil society organisations in the information-gathering and dissemination process.⁶⁰⁹

I am in complete agreement with Liebenberg as to the enhanced role that the SAHRC should assume as a means to hold the state accountable in progressively giving effect to constitutionally guaranteed socio-economic rights. In this regard the SAHRC is not only mandated to take receipt of Reports on an annual basis from relevant organs of state⁶¹⁰ but is perfectly placed to engage with the state (as well as field representations from NGOs as well as the broader public) in striving to forge a nation-state in which all people are treated with equal respect.

Section 7(2)⁶¹¹ [read with section 39] is viewed as illustrating the critical importance of information pertaining to international human rights law (which has provided content to the positive duties borne by states) in a manner consistent with Shue's 'four-fold obligations typology adopted by section 7(2)' as previously mentioned.⁶¹² In addition, Scott and Alston seek to identify the 'overarching principles and underlying values' in the Constitution that are relevant to purposive interpretation.⁶¹³ Thus,

⁶⁰⁶ Liebenberg S 'Interpretation of socio-economic rights' (2003) (Section 33.13) 1.

⁶⁰⁷ Liebenberg S 'Interpretation of socio-economic rights' (2003) (Section 33.13) 1.

⁶⁰⁸ Liebenberg S 'Interpretation of socio-economic rights' (2003) (Section 33.13) 1. Please see <https://www.sahrc.org.za/index.php/about-us/about-the-sahrc>, (accessed 13 January 2018).

⁶⁰⁹ Liebenberg S 'Interpretation of socio-economic rights' (2003) (Section 33.13) 2. Please see <https://www.sahrc.org.za/index.php/about-us/about-the-sahrc>, (accessed 13 January 2018).

⁶¹⁰ Section 184 [3] of the Constitution of South Africa, 1996.

⁶¹¹ The state must respect, protect, promote and fulfil the rights in the Bill of Rights.

⁶¹² Scott C & Alston P 'Adjudicating constitutional priorities' *SAJHR* (2000) 215.

⁶¹³ Scott C & Alston P 'Adjudicating constitutional priorities' *SAJHR* (2000) 215.

section 39 is viewed as providing the values that must inform interpretation in an open and democratic society based on human dignity, equality and freedom.⁶¹⁴ Consequently, it is noted that 'the nuanced, complex and onerous nature of the interpretive responsibility' borne by the courts is rendered clear by the manner in which section 39 (1) (a) is interlinked with sections 7(1)⁶¹⁵ and 26.⁶¹⁶

In this regard section 7(1) serves to emphasise that the values of human dignity, equality and freedom can be viewed as 'the ultimate normative sources' of the rights enshrined in the Bill of Rights.⁶¹⁷ It is of interest to note that the limitations clause⁶¹⁸ utilises those same three values to ascertain the substantive manner in which rights in the Bill of Rights can be justifiably limited.⁶¹⁹ Thus, Scott and Alston rightfully believe that 'the constitutional meta-values of human dignity, equality and freedom are both the genesis of rights and the basis for the principled limitation of those rights'.⁶²⁰

It follows that any limitation imposed on a right must be in terms of a law of general application and is only permissible 'to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom'.⁶²¹ Thus, the limitations clause plays an important role in relation to all rights (including socio-economic rights) in the Bill of Rights.⁶²² Consequently, the state would have to publically define and justify a proposed limitation (as well as the nature and extent of that limitation) if the state sought to reduce its duties pertaining to socio-economic rights.⁶²³ This is (correctly) viewed as

⁶¹⁴ Scott C & Alston P 'Adjudicating constitutional priorities' *SAJHR* (2000) 218.

⁶¹⁵ Section 7(1) provides that 'This Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom.'

⁶¹⁶ Scott C & Alston P 'Adjudicating constitutional priorities' *SAJHR* (2000) 220.

⁶¹⁷ Scott C & Alston P 'Adjudicating constitutional priorities' *SAJHR* (2000) 220.

⁶¹⁸ Section 36 of the Constitution of the Republic of South Africa, 1996.

⁶¹⁹ Scott C & Alston P 'Adjudicating constitutional priorities' *SAJHR* (2000) 220.

⁶²⁰ Scott C & Alston P 'Adjudicating constitutional priorities' *SAJHR* (2000) 220.

⁶²¹ Scott C & Alston P 'Adjudicating constitutional priorities' *SAJHR* (2000) 220.

⁶²² Scott C & Alston P 'Adjudicating constitutional priorities' *SAJHR* (2000) 220.

⁶²³ Scott C & Alston P 'Adjudicating constitutional priorities' *SAJHR* (2000) 220.

promoting public accountability in support of a constitutional commitment to realise socio-economic rights.⁶²⁴

The critical importance of the monitoring and enforcement of the realisation of socio-economic rights (so as to alleviate the suffering and deprivation endured by vulnerable groups) is captured in the insightful perspective offered by Biney as follows:

‘The Western notion of human rights stresses rights which are not very interesting in the context of African realities. There is much concern with the right to peaceful assembly, free speech and thought, fair trial... The appeal of these rights is sociologically specific. They appeal to people with a full stomach who can now afford to pursue the more esoteric aspects of self-fulfilment. The vast majority of our people are not in this position. They are facing the struggle for existence in its brutal immediacy’.⁶²⁵

I am in complete agreement with the sentiments expressed by Biney as there is a clear need to maintain an unerring focus on the abhorrent suffering endured by vulnerable groups by virtue of not being in a position to access key socio-economic rights. It is submitted that this is in keeping with the contribution by Brand in casting light on the perpetual deprivation endured by vulnerable groups so as to expedite the cessation of the aforementioned suffering.⁶²⁶

3.4 The obligations of state parties’ in relation to the ICESCR

The Republic of South Africa is duty-bound to honour its international law commitments as per the valuable insight offered by De Vos as follows:

‘The body of international standards is of significant importance with specific reference to the international human rights instruments and in this regard the ICESCR features prominently. This serves to advance consistency between the laws and

⁶²⁴ Scott C & Alston P ‘Adjudicating constitutional priorities’ *SAJHR* (2000) 220.

⁶²⁵ Biney A ‘The historical discourse on African humanism’ (2014) 48.

⁶²⁶ Brand D ‘What Are Socio-Economic Rights For?’ (2003) 35. Please also see Section 3.6.1.

policies of South Africa and its obligations in the international human rights arena as well as to provide a legitimate source in analysing the nature of the rights and duties imposed on the state party'.⁶²⁷

The ICESCR⁶²⁸ (also known as the 'the Covenant' as previously described) is the pre-eminent international treaty safeguarding economic and social rights and was adopted on 16 December 1966 and entered into force on 3 January 1976.⁶²⁹

South Africa signed the ICESCR on 3 October 1994 and in so doing highlighted its intention to become a party to (and consequently be bound by) the ICESCR.⁶³⁰ South Africa subsequently ratified the ICESCR on 18 January 2015 and it entered into force on 12 April 2015.⁶³¹ The ICESCR is the sister covenant to the International Covenant on Civil and Political Rights (1966) ('the ICCPR') with the latter Covenant also previously ratified by South Africa.⁶³² The ICCPR was adopted on 16 December 1966 and entered into force on 23 March 1976.⁶³³ The importance of the 'normative exchange' between the ICESCR and the ICCPR is specifically noted in that there has been general agreement for a considerable amount of time that the 'right to life' in Article 6 of the ICCPR 'overlaps with and draws upon the essential interests protected by various ICESCR rights such as those respecting health'.⁶³⁴

⁶²⁷ De Vos 'Pious wishes' *SAJHR* (1997) 76.

⁶²⁸ International Covenant <http://www.refworld.org/docid/3ae6b36c0.html>, (accessed 31 July 2016).

⁶²⁹ Liebenberg S 'Interpretation of socio-economic rights' (2003) (Section 33.4) 2.

⁶³⁰ Liebenberg S 'Interpretation of socio-economic rights' (2003) (Section 33.4) 2. Please see International Covenant <http://www.refworld.org/docid/3ae6b36c0.html>, (accessed 31 July 2016).

⁶³¹ Liebenberg S 'Interpretation of socio-economic rights' (2003) (Section 33.4) 2.

⁶³² Liebenberg S 'Interpretation of socio-economic rights' (2003) (Section 33.4) 2. Please see International Covenant <http://www.refworld.org/docid/3ae6b36c0.html>, (accessed 31 July 2016).

⁶³³ Liebenberg S 'Interpretation of socio-economic rights' (2003) (Section 33.4) 2.

⁶³⁴ Scott C & Alston P 'Adjudicating constitutional priorities' *SAJHR* (2000) 226.

The Preamble of the ICESCR is illuminating in sketching a vision of a sanctuary for all (which is similar to the Preamble of the South African Constitution) in that:

‘...the ideal of free human beings enjoying freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his economic, social and cultural rights, as well as his civil and political rights...’ and ‘Realising that the individual, having duties to other individuals and to the community to which he belongs, is under a responsibility to strive for the promotion and observance of the rights recognised in the present Covenant.’⁶³⁵

The UN Committee has noted two aspects in the duty to fulfil.⁶³⁶ The first is a duty to facilitate and support communities to secure access to socio-economic rights.⁶³⁷ The second duty entails providing the relevant goods directly, whenever an individual or group is unable for reasons that are outside of their control, to secure access to that right.⁶³⁸ The latter aspect of the duty to fulfil is aimed at groups that find themselves in especially desperate circumstances.⁶³⁹ It should be noted that all three socio-economic rights cases heard in the Constitutional Court (i.e. *Soobramoney*, *Grootboom* and *TAC* respectively) had been concluded for some time before the ICESCR was ratified. Thus, prior to ratification the ICESCR was neither binding on South Africa under international law nor did it have any direct legal effect in domestic law. However, it did

⁶³⁵ International Covenant <http://www.refworld.org/docid/3ae6b36c0.html>, (accessed 31 July 2016).

⁶³⁶ Liebenberg S ‘Interpretation of socio-economic rights’ (2003) (Section 33.2) 3.

⁶³⁷ Liebenberg S ‘Interpretation of socio-economic rights’ (2003) (Section 33.2) 3.

⁶³⁸ Liebenberg S ‘Interpretation of socio-economic rights’ (2003) (Section 33.2) 3.

⁶³⁹ General Comment No.12: The Right to Adequate Food, <http://www.refworld.org/pdfid/4538838c11.pdf>, (accessed 1 August 2016) para 15. Please see General Comment No. 14: The Right to the Highest Attainable Standard of Health, <http://www.refworld.org/docid/4538838d0.html>, (accessed 1 August 2016) para 37. Please also see General Comment No. 15: The Right to Water (Arts. 11 and 12 of the Covenant), 20 January 2003, <http://www.refworld.org/docid/4538838d11.html>, (accessed 1 August 2016) para 25.

serve as a critical guide under section 39(1)(b) to offer insight as to the interpretation of socio-economic rights under our Constitution.⁶⁴⁰ In this regard it is submitted that the General Comments (as issued by the UN Committee and described below) provide domestic courts with definitive guidance as to the duties of the State Party in terms of relevant international law.

The UN Committee expands on the framework of ICESCR principles by publishing General Comments with the latter being described as follows:

‘These are juridical acts by UN human rights treaty bodies which are designed to set out, in relatively succinct form, the content of states’ obligations under the relevant treaty with respect to a given right, or aspect of a right, or with respect to the treaty as a whole; the principles are articulated only after enough experience evaluating state reports has been generated for principles to be synthesised, articulated and to an extent developed in one easy-to-access document.’⁶⁴¹

Furthermore, Article 2 (1) stipulates the general obligations in the ICESCR as follows:

‘Each State Party to the Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realisation of the rights recognised in the present Covenant by all appropriate means, including particularly the adoption of legislative measures’.⁶⁴²

It is acknowledged that civil, political and socio-economic rights are connected and interdependent as previously stated. Shue has provided

⁶⁴⁰ Liebenberg S ‘Interpretation of socio-economic rights’ (2003) (Section 33.4) 2. Please note that section 39 (1) (b) provides that: ‘When interpreting the Bill of Rights, a court, tribunal or forum must consider international law.’

⁶⁴¹ Scott C & Alston P ‘Adjudicating constitutional priorities’ *SAJHR* (2000) 225.

⁶⁴² Article 2(1) of the International Covenant
<http://www.refworld.org/docid/3ae6b36c0.html>, (accessed 31 July 2016).

(as previously discussed) a nuanced account of the aforementioned types of rights which served as the basis for its incorporation in the ICESCR. Furthermore, the minimum core obligation approach as advanced by Bilchitz⁶⁴³ is a modified version of the ICESCR. Consequently, the Republic of South Africa, in ratifying the ICESCR, has bound itself to the obligations, goals and standards of the ICESCR and will be obliged under international law to conduct itself in a manner that does not detract from the spirit of the ICESCR.⁶⁴⁴ Also, ratification of the ICESCR necessitates an alignment of the relevant domestic legislation and policies with the obligations imposed by the ICESCR.⁶⁴⁵ The aforementioned ratification on the part of the Republic of South Africa (ostensibly) demonstrates its willingness to advance socio-economic rights and is likely to bolster its international credibility in its approach towards safeguarding socio-economic rights.⁶⁴⁶

Furthermore, state parties to the ICESCR are subject to the reporting procedures as provided for by the UN Committee in terms of which the realisation of rights (that are safeguarded in the ICESCR) are monitored through the evaluation of state reports.⁶⁴⁷ Thus, South Africa will be obliged to furnish the UN Committee with an initial report (setting out details of the manner in which it would give effect to the realisation of rights as contained in the ICESCR) within two years of ratifying the Covenant.⁶⁴⁸ Thereafter, it would be duty bound to submit reports to the UN Committee every five years.⁶⁴⁹ The ratification of the ICESCR not

⁶⁴³ Please see Section 3.5.

⁶⁴⁴ International Covenant, <http://www.refworld.org/docid/3ae6b36c0.html>, (accessed 31 July 2016).

⁶⁴⁵ International Covenant, <http://www.refworld.org/docid/3ae6b36c0.html>, (accessed 31 July 2016).

⁶⁴⁶ Liebenberg S 'The international covenant' *SAJHR* (1995) 359-360.

⁶⁴⁷ Petherbridge D 'South Africa's pending ratification of the International Covenant on economic, social and cultural rights: what are the implications?' <http://blogs.sun.ac.za/seraj/files/2012/11/South-Africas-pending-ratification-of-the-ICESCR.pdf> (accessed 17 June 2016) (hereafter What are the implications?).

⁶⁴⁸ UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 1: Reporting by States Parties, 27 July 1981, available at: <http://www.refworld.org/docid/4538838b2.html>, (accessed 1 August 2016).

⁶⁴⁹ UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 1: Reporting by States Parties, 27 July 1981, available at:

only serves to confirm South Africa's commitment to socio-economic rights but also demonstrates its commitment to eradicating poverty (as well as strengthening development) through drawing on both domestic and international resources.⁶⁵⁰ It is believed that the state reporting procedure under the ICESCR will strengthen the culture of accountability in South Africa through referencing national and international human rights standards.⁶⁵¹

Furthermore, the aforementioned reporting procedure will strengthen the efforts of the SAHRC in monitoring the implementation of socio-economic rights (by the South African government) with regards to the numerous challenges that have arisen 'in relation to approach and methodology' in so far as giving effect to those same rights.⁶⁵² Those same reporting procedures also present national and international NGO's with the opportunity to furnish the UN Committee with 'shadow reports'.⁶⁵³ The purpose of the aforementioned shadow reports is to provide a suitable platform for organisations to table their concerns about the conduct of the relevant State Party (in giving effect to socio-economic rights as provided for in the ICESCR) which in turn could possibly influence the recommendations subsequently issued by the UN Committee to the relevant State Party.⁶⁵⁴ Furthermore, the UN Committee prepares Concluding Observations which aim to provide the relevant State Party with recommendations that would assist the same

<http://www.refworld.org/docid/4538838b2.html>, (accessed 1 August 2016). Please also see Liebenberg S 'The international covenant' *SAJHR* (1995) 369.

⁶⁵⁰ Chenwi L & Hardowar R 'Promoting socio-economic rights in South Africa through the ratification and implementation of the ICESCR and its Optional Protocol' *ESR Review Volume* 11 No.1 (2010) 4 (hereafter Promoting socio-economic rights).

⁶⁵¹ Chenwi L & Hardowar R 'Promoting socio-economic rights' *ESR Review* (2010) 4.

⁶⁵² Chenwi L & Hardowar R 'Promoting socio-economic rights' *ESR Review* (2010) 4.

⁶⁵³ Petherbridge D 'What are the implications?'

<http://blogs.sun.ac.za/seraj/files/2012/11/South-Africas-pending-ratification-of-the-ICESCR.pdf>, (accessed 17 June 2016).

⁶⁵⁴ Petherbridge D 'What are the implications?'

<http://blogs.sun.ac.za/seraj/files/2012/11/South-Africas-pending-ratification-of-the-ICESCR.pdf>, (accessed 17 June 2016).

State Party to bolster the implementation of the rights safeguarded in the ICESCR.⁶⁵⁵

The ratification of the ICESCR requires the South African courts 'to align their jurisprudence' with the obligations as provided for in the ICESCR.⁶⁵⁶ Thus, it is implied that the courts would need to protect that which the UN Committee has described as the 'minimum core obligation' imposed by the provisions of the ICESCR.⁶⁵⁷ Consequently, the State Party would need to safeguard the provision of 'an essential basic floor of socio-economic rights provisioning such as food, water and social security...'⁶⁵⁸ Thus, the ratification of the ICESCR should facilitate the process through which South African jurisprudence 'develops in harmony with the normative standards set by the ICESCR' in relation to socio-economic rights.⁶⁵⁹ However, Chenwi and Hardowar make mention of the reluctance of the Constitutional Court to adopt the minimum core approach which 'caters adequately for the needs of the poor in providing more specific and effective remedies'.⁶⁶⁰ In this regard the Constitutional Court has embraced a reasonableness test in evaluating the conduct of the State in meeting its positive obligations pertaining to the socio-economic rights enshrined in the Constitution.⁶⁶¹ There is an expectation that the Constitutional Court, in light of the ratification of the ICESCR, would need to develop/augment the aforementioned reasonableness test so that an obligation is borne by

⁶⁵⁵ Petherbridge D 'What are the implications?' <http://blogs.sun.ac.za/seraj/files/2012/11/South-Africas-pending-ratification-of-the-ICESCR.pdf>, (accessed 17 June 2016).

⁶⁵⁶ Petherbridge D 'What are the implications?' <http://blogs.sun.ac.za/seraj/files/2012/11/South-Africas-pending-ratification-of-the-ICESCR.pdf>, (accessed 17 June 2016).

⁶⁵⁷ Petherbridge D 'What are the implications?' <http://blogs.sun.ac.za/seraj/files/2012/11/South-Africas-pending-ratification-of-the-ICESCR.pdf>, (accessed 17 June 2016).

⁶⁵⁸ Petherbridge D 'What are the implications?' <http://blogs.sun.ac.za/seraj/files/2012/11/South-Africas-pending-ratification-of-the-ICESCR.pdf>, (accessed 17 June 2016).

⁶⁵⁹ Chenwi L & Hardowar R 'Promoting socio-economic rights' *ESR Review* (2010) 4.

⁶⁶⁰ Chenwi L & Hardowar R 'Promoting socio-economic rights' *ESR Review* (2010) 4.

⁶⁶¹ Petherbridge D 'What are the implications?' <http://blogs.sun.ac.za/seraj/files/2012/11/South-Africas-pending-ratification-of-the-ICESCR.pdf>, (accessed 17 June 2016).

the state to prioritise the protection of basic socio-economic needs.⁶⁶² Thus, the ratification of the ICESCR should result in South Africa broadening the scope of benefits in relation to the right to education and work as a means to more adequately cater for 'the poor, marginalised and vulnerable'.⁶⁶³

Nonetheless, it will be of considerable academic interest to see how the Constitutional Court will contend with the minimum core obligation approach (as endorsed by the UN Committee) given that the Constitutional Court has previously distanced itself from the minimum core obligation approach.⁶⁶⁴ However, it is deemed necessary to ensure that South African jurisprudence is better aligned to the 'UN Committee's authoritative interpretation' of the duties borne by a State Party in terms of the ICESCR.⁶⁶⁵ It should be noted that many of the rights provided for in the ICESCR are afforded protection through the inclusion of socio-economic rights in the Bill of Rights of the South African Constitution.⁶⁶⁶ Also, a number of the aforementioned socio-economic rights (and the manner in which they have been formulated) are similar to (and were in fact inspired by) the relevant provisions of the ICESCR.⁶⁶⁷ Furthermore, a raft of legislative and policy measures in South Africa serve to protect the rights in the ICESCR.⁶⁶⁸ Thus, Petherbridge believes that the General Comments (as issued by the UN Committee) will play a critical role in assisting the courts to negotiate a path of consistency between

⁶⁶² Petherbridge D 'What are the implications?' <http://blogs.sun.ac.za/seraj/files/2012/11/South-Africas-pending-ratification-of-the-ICESCR.pdf>, (accessed 17 June 2016).

⁶⁶³ Chenwi L & Hardowar R 'Promoting socio-economic rights' *ESR Review* (2010) 5.

⁶⁶⁴ Please see Section 3.5 (Minimum core obligation) and Section 3.6 (Socio-economic rights jurisprudence).

⁶⁶⁵ Petherbridge D 'What are the implications?' <http://blogs.sun.ac.za/seraj/files/2012/11/South-Africas-pending-ratification-of-the-ICESCR.pdf>, (accessed 17 June 2016).

⁶⁶⁶ Petherbridge D 'What are the implications?' <http://blogs.sun.ac.za/seraj/files/2012/11/South-Africas-pending-ratification-of-the-ICESCR.pdf>, (accessed 17 June 2016).

⁶⁶⁷ Petherbridge D 'What are the implications?' <http://blogs.sun.ac.za/seraj/files/2012/11/South-Africas-pending-ratification-of-the-ICESCR.pdf>, (accessed 17 June 2016).

⁶⁶⁸ Petherbridge D 'What are the implications?' <http://blogs.sun.ac.za/seraj/files/2012/11/South-Africas-pending-ratification-of-the-ICESCR.pdf>, (accessed 17 June 2016).

the relevant domestic law and policies and the obligations borne by South Africa under the ICESCR.⁶⁶⁹

The Optional Protocol to the ICESCR ('OP-ICESCR') was adopted by the General Assembly on 10 December 2008 (and was opened for signature on 24 September 2009).⁶⁷⁰ The OP-ICESCR duly came into force on 5 May 2013.⁶⁷¹ Petherbridge believes that South Africa (in having ratified the ICESCR) should give immediate consideration to signing and ratifying the OP-ICESCR as this mechanism will permit individual victims of socio-economic rights abuses to obtain redress in the absence of suitable domestic remedies.⁶⁷² The OP-ICESCR provides for the submission of relevant information, by or on behalf of individuals/groups of individuals, to the UN Committee on the back of allegations that the relevant State Party has violated rights contained in the ICESCR.⁶⁷³

The UN Committee assumes a quasi-adjudicative role and offers an international complaints mechanism which will become accessible where domestic remedies have been exhausted or in those instances where there have been unreasonable delays in giving effect to domestic remedies in relation to Article 3.⁶⁷⁴ In addition, if placed under the aforementioned examination, the relevant State Party will be subject to the scrutiny of the UN Committee through its views and

⁶⁶⁹ Petherbridge D 'What are the implications?' <http://blogs.sun.ac.za/seraj/files/2012/11/South-Africas-pending-ratification-of-the-ICESCR.pdf>, (accessed 17 June 2016).

⁶⁷⁰ Optional Protocol to the International Covenant on Economic, Social and Cultural Rights: resolution / adopted by the General Assembly, 5 March 2009, A/RES/63/117, <http://www.refworld.org/docid/49c226dd0.html>, accessed 1 August 2016 (hereafter Optional Protocol).

⁶⁷¹ Petherbridge D 'What are the implications?' <http://blogs.sun.ac.za/seraj/files/2012/11/South-Africas-pending-ratification-of-the-ICESCR.pdf>, (accessed 17 June 2016).

⁶⁷² Petherbridge D 'What are the implications?' <http://blogs.sun.ac.za/seraj/files/2012/11/South-Africas-pending-ratification-of-the-ICESCR.pdf>, (accessed 17 June 2016).

⁶⁷³ Optional Protocol <http://www.refworld.org/docid/49c226dd0.html>, (accessed 1 August 2016).

⁶⁷⁴ Optional Protocol <http://www.refworld.org/docid/49c226dd0.html>, (accessed 1 August 2016).

recommendations.⁶⁷⁵ The OP-ICESCR also provides for inter-state communication mechanisms in terms of which a State Party to the OP-ICESCR can take another State Party to task for the non-fulfilment of obligations that are due under the ICESCR.⁶⁷⁶ However, this is subject to both State Parties having duly recognised the authority of the UN Committee to receive and consider communications in this regard.⁶⁷⁷

Also, the OP-ICESCR makes provision for an inquiry procedure in terms of which the UN Committee can evaluate information and table its observations.⁶⁷⁸ The UN Committee, in terms of the aforementioned procedure, may pursue its own inquiry into the conduct of the State Party in light of information received that suggest grave or systematic violations of the rights safeguarded in the ICESCR.⁶⁷⁹ However, it is dependent upon the State Party recognising the authority of the UN Committee.⁶⁸⁰ The UN Committee is permitted to relay comments and recommendations to the relevant State Party in terms of this inquiry procedure.⁶⁸¹ Thus, ratifying the OP-ICESCR will ensure that South Africa is subject to the abovementioned procedures and consequently held to a higher standard of accountability which in turn requires a higher degree of transparency.⁶⁸²

⁶⁷⁵ Article 9 of the Optional Protocol <http://www.refworld.org/docid/49c226dd0.html>, (accessed 1 August 2016).

⁶⁷⁶ Article 10 of the Optional Protocol <http://www.refworld.org/docid/49c226dd0.html>, (accessed 1 August 2016).

⁶⁷⁷ Article 10 of the Optional Protocol <http://www.refworld.org/docid/49c226dd0.html>, (accessed 1 August 2016).

⁶⁷⁸ Article 10 of the Optional Protocol <http://www.refworld.org/docid/49c226dd0.html>, (accessed 1 August 2016).

⁶⁷⁹ Article 11 of the Optional Protocol <http://www.refworld.org/docid/49c226dd0.html>, (accessed 1 August 2016).

⁶⁸⁰ Article 11 of the Optional Protocol <http://www.refworld.org/docid/49c226dd0.html>, (accessed 1 August 2016).

⁶⁸¹ Article 11 of the Optional Protocol <http://www.refworld.org/docid/49c226dd0.html>, (accessed 1 August 2016).

⁶⁸² Article 11 of the Optional Protocol <http://www.refworld.org/docid/49c226dd0.html>, (accessed 1 August 2016).

Furthermore, the OP-ICESCR obliges the State Parties to circulate copies of the ICESCR, the OP-ICESCR as well as the views and recommendations as furnished by the UN Committee.⁶⁸³ It follows that substantive knowledge of the obligations borne by the Republic of South Africa in terms of the ICESCR (as well as the individual complaints mechanisms if the OP-ICESCR is adopted) can be a formidable catalyst in elevating the awareness of civil society as to their socio-economic rights.⁶⁸⁴ This can bring about the active participation of civil society in holding the government accountable with regards to the progressive implementation of socio-economic rights in South Africa.⁶⁸⁵ It should be noted that ratifying the OP-ICESCR will improve the State Party's adherence to the ICESCR as the communication and inquiry procedures will encourage that same State Party to fully incorporate the ICESCR into its municipal law and policies.⁶⁸⁶ Thus, South Africa stands to gain considerably from the ratification of the ICESCR as it bolsters the safeguarding and realisation of socio-economic rights in South Africa.⁶⁸⁷ Furthermore, this should compel the state to exhibit an elevated standard of accountability in striving to respect, protect and fulfil the socio-economic rights enshrined in the Bill of Rights.⁶⁸⁸

Chenwi and Hardowar believe that the OP-ICESCR should be ratified as it promotes an accountability culture as well as empowering 'poor, vulnerable and marginal groups'.⁶⁸⁹ The ratification of the OP-ICESCR will bolster the safeguarding of socio-economic rights 'through policy, legislation and jurisprudence' as well as demonstrate that South Africa has embraced a higher standard of accountability by recognising the

⁶⁸³ Article 11 of the Optional Protocol <http://www.refworld.org/docid/49c226dd0.html>, (accessed 1 August 2016).

⁶⁸⁴ Please see Section 3.4.1.

⁶⁸⁵ Optional Protocol <http://www.refworld.org/docid/49c226dd0.html>, (accessed 1 August 2016).

⁶⁸⁶ Optional Protocol <http://www.refworld.org/docid/49c226dd0.html>, (accessed 1 August 2016).

⁶⁸⁷ Optional Protocol <http://www.refworld.org/docid/49c226dd0.html>, (accessed 1 August 2016).

⁶⁸⁸ Optional Protocol <http://www.refworld.org/docid/49c226dd0.html>, (accessed 1 August 2016).

⁶⁸⁹ Chenwi L & Hardowar R 'Promoting socio-economic rights' *ESR Review* (2010) 5.

authority of the UN Committee to consider complaints and furnish the relevant state party with 'its views and recommendations on addressing the challenges identified'.⁶⁹⁰ The OP-ICESCR can also assist in sourcing international assistance for states with significant resource constraints.⁶⁹¹ This is in keeping with the recognition, as embraced by both the ICESCR and the South African Constitution, that the full realisation of socio-economic rights 'is dependent on resources'.⁶⁹² Chenwi and Hardowar believe that ratification of the OP-ICESCR will enable South Africa to lead the way in relation to the realisation of human rights at the regional level in Africa.⁶⁹³

The ratification of the ICESCR (as well as the ratification of the OP-ICESCR in time to come) will not dramatically alter the implementation of socio-economic rights in the short term.⁶⁹⁴ However, it is believed that the ICESCR and OP-ICESCR have a pivotal role to play in the realisation of socio-economic rights in the 'medium to long-term'.⁶⁹⁵ In this regard the benefits that can flow from a treaty are reliant on its implementation as well as the lobbying power of civil society groups (in holding the state party accountable) so as to ensure that the relevant treaty provisions give rise to tangible benefits.⁶⁹⁶

Petherbridge believes that ratification will consolidate South Africa's role in advancing the rights of poor people and that the individual complaint mechanism of the OP-ICESCR 'promotes a culture of accountability for implementing the ICESCR'.⁶⁹⁷ Thus, the OP-ICESCR is indeed of critical importance in safeguarding against future violations as well as 'fostering

⁶⁹⁰ Chenwi L & Hardowar R 'Promoting socio-economic rights' *ESR Review* (2010) 5.

⁶⁹¹ Optional Protocol <http://www.refworld.org/docid/49c226dd0.html>, (accessed 1 August 2016).

⁶⁹² Chenwi L & Hardowar R 'Promoting socio-economic rights' *ESR Review* (2010) 5. Please see *Soobramoney* (1998) paras 21 and 41 as well as *Grootboom* (2000) para 46. Please also see General Comment No. 3, <http://www.refworld.org/docid/4538838e10.html>, (accessed 1 August 2016).

⁶⁹³ Chenwi L & Hardowar R 'Promoting socio-economic rights' *ESR Review* (2010) 5.

⁶⁹⁴ Chenwi L & Hardowar R 'Promoting socio-economic rights' *ESR Review* (2010) 6.

⁶⁹⁵ Chenwi L & Hardowar R 'Promoting socio-economic rights' *ESR Review* (2010) 6.

⁶⁹⁶ Chenwi L & Hardowar R 'Promoting socio-economic rights' *ESR Review* (2010) 6.

⁶⁹⁷ Petherbridge D 'What are the implications?' <http://blogs.sun.ac.za/seraj/files/2012/11/South-Africas-pending-ratification-of-the-ICESCR.pdf>, (accessed 17 June 2016).

the perceptions of social rights as rights, and not simply desirable policy objectives'.⁶⁹⁸

I firmly agree with the abovementioned authors as to the importance of the OP-ICESCR in bolstering accountability on the part of the state to advance socio-economic rights. In addition, it is submitted that the state should ratify the OP-ICESCR as a matter of urgency – this will serve as a credible display of political will on the part of the state to be held to a higher standard of accountability in meeting the pressing needs of vulnerable groups.

3.4.1 The duties of the state in relation to the dissemination of information to the public/vulnerable groups

The possession of information is deemed critical in securing economic and social well-being.⁶⁹⁹ The dissemination of information is recognised as a critical (and often extremely cost-effective) way for the State to drive the advancement of ICESCR rights.⁷⁰⁰ It is (seemingly) not at present possible to provide every individual in South Africa with the necessary health care to safeguard his/her survival but the state must act to implement programmes that seek to eliminate a number of the most prevalent threats to survival such as malnutrition and HIV/AIDS.⁷⁰¹ In this regard the Department of Health has to discharge a critical obligation in ensuring the development of pragmatic minimum standards for the public health care system as a matter of urgency.⁷⁰²

The state should give effect to its constitutional duties in part through articulating clear sectoral goals through a properly considered policy in relation to the dissemination of information.⁷⁰³ This includes specifying a minimum level of service as well as comprehensive plans and

⁶⁹⁸ Liebenberg S 'The international covenant' *SAJHR* (1995) 371.

⁶⁹⁹ Robertson R 'Measuring state compliance with the obligation to devote the "maximum available resources" to realizing economic, social and cultural rights.' (1994) 16 *Human Rights Quarterly* 697 (hereafter Measuring state compliance).

⁷⁰⁰ Robertson R 'Measuring state compliance' *Human Rights Quarterly* 697.

⁷⁰¹ Bilchitz D *Poverty and Fundamental Rights* (2007) 225.

⁷⁰² Bilchitz D *Poverty and Fundamental Rights* (2007) 225.

⁷⁰³ Bilchitz D *Poverty and Fundamental Rights* (2007) 225.

programmes (with indicators, targets and deadlines that can be assessed) to progressively increase the quality of health care over time.⁷⁰⁴ Thus, the state would fall foul of its constitutional obligations if it failed to meet the aforementioned targets as this would be indicative of a failure to progressively realise the right to health.⁷⁰⁵ In addition, the courts should display the necessary resolve in imposing obligations on the state to develop such a plan/strategy (as well as evaluate that plan for its effectiveness in achieving the stated goals) as a means to ensure that the state progressively realises the right to health care as enshrined in the Constitution.⁷⁰⁶

Robertson believes that financial, natural, human, technological and informational resources are the most critical resources in securing ICESCR rights.⁷⁰⁷ Thus, it is of paramount importance to determine the extent of the obligation of the member state to possibly allocate all of the resources potentially required to ensure the realisation of ICESCR rights.⁷⁰⁸ The mainstream perspective has always been that the extent of the available resources cannot be determined with exclusive reference to government budgets.⁷⁰⁹ Thus, both central government expenditures and international assistance should be considered in assessing the maximum available resources of the state.⁷¹⁰ Furthermore, the voluntary use of private resources is referred to as 'creating space' and could be channelled by the state through the possible facilitation of land reform measures (such as land rights and agrarian reform) and raising taxes payable in the inheritance, property

⁷⁰⁴ Bilchitz D *Poverty and Fundamental Rights* (2007) 225.

⁷⁰⁵ Bilchitz D *Poverty and Fundamental Rights* (2007) 225.

⁷⁰⁶ Bilchitz D *Poverty and Fundamental Rights* (2007) 225.

⁷⁰⁷ Robertson R 'Measuring state compliance' (1994) 16 *Human Rights Quarterly* 697.

⁷⁰⁸ Robertson R 'Measuring state compliance' (1994) 16 *Human Rights Quarterly* 698.

⁷⁰⁹ Robertson R 'Measuring state compliance' (1994) 16 *Human Rights Quarterly* 698.

⁷¹⁰ Robertson R 'Measuring state compliance' (1994) 16 *Human Rights Quarterly* 698.

and net wealth spheres.⁷¹¹ The state could consequently be called to account (as to whether it had secured access to all domestic resources as well as all available international assistance) in giving effect to ICESCR obligations.⁷¹²

As previously noted, the UN Committee has provided content to socio-economic rights as well as the obligations that have to be borne by states by way of issuing General Comments.⁷¹³ In this regard the principles that govern the obligations of state parties to the ICESCR are outlined in General Comment 3.⁷¹⁴ Furthermore, the UN Committee has advocated the adoption of a minimum core obligation philosophy as previously indicated.⁷¹⁵ It should be noted that General Comment 3 makes a distinction between 'obligations of conduct' and 'obligations of result'.⁷¹⁶ 'Obligations of conduct' are concerned with state parties pursuing a course of action 'reasonably calculated to realise the enjoyment of a particular right'.⁷¹⁷ 'Obligations of result' on the other hand require 'states to achieve specific targets to satisfy a detailed substantive standard'.⁷¹⁸ However, the ICESCR provisions are mostly drafted as obligations of result which are only rendered justiciable with difficulty.⁷¹⁹ It is for the aforementioned reason that the clarification offered by the Limburg Principles,⁷²⁰ in relation to the obligations of the state party, is critical.⁷²¹ The Limburg Principles were adopted in June 1986 'by a group of respected international experts, and are regarded as an authoritative

⁷¹¹ Robertson R 'Measuring state compliance' (1994) 16 *Human Rights Quarterly* 700.

⁷¹² Robertson R 'Measuring state compliance' (1994) 16 *Human Rights Quarterly* 700.

⁷¹³ Bilchitz D *Poverty and Fundamental Rights* (2007) 183.

⁷¹⁴ General Comment No. 3: <http://www.refworld.org/docid/4538838e10.html>, (accessed 1 August 2016).

⁷¹⁵ General Comment No. 3: <http://www.refworld.org/docid/4538838e10.html>, (accessed 1 August 2016).

⁷¹⁶ General Comment No. 3: <http://www.refworld.org/docid/4538838e10.html>, (accessed 1 August 2016).

⁷¹⁷ Bilchitz D *Poverty and Fundamental Rights* (2007) 183.

⁷¹⁸ Bilchitz D *Poverty and Fundamental Rights* (2007) 183.

⁷¹⁹ Bilchitz D *Poverty and Fundamental Rights* (2007) 183.

⁷²⁰ The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights' UN Doc E/CN.4/1987/17 (hereafter The Limburg Principles).

⁷²¹ De Vos P 'Economic and social rights of children' (1995) 10 *SAPR/PL* 250.

guide to the interpretation of States Parties' obligations under the Covenant on Economic, Social and Cultural Rights'.⁷²²

The Limburg Principles provide that 'State parties are obligated, regardless of the level of economic development, to ensure respect for the minimum subsistence rights for all'.⁷²³ The Limburg Principles also outline that 'Although the full realisation of the rights recognised in the Covenant is to be attained progressively, the application of some of these rights can be made justiciable immediately while other rights can become justiciable over time.'⁷²⁴

In addition, the Limburg Principles advocate the advancement of a group of 'near-absolute, core entitlements' to provide for the basic subsistence needs of the most vulnerable people in states that are party to the ICESCR.⁷²⁵ Thus, an obligation to meet the needs of the most vulnerable people is immediately enforceable and is not dependent on the availability of resources except for the poorest countries.⁷²⁶ Furthermore, the needs of the most vulnerable people (i.e. those that are not able to meet their basic needs/cannot fend for themselves) should be prioritised through government intervention.⁷²⁷ It should be noted that the majority of the articles in the ICESCR provide specific steps that State Parties are required to take in progressively striving to attain full realisation of the rights.⁷²⁸

The Limburg Principles also provide that the 'progressive realisation of the right' should not be construed as suggesting that the state has licence to postpone the realisation of a right to a distant future.⁷²⁹ Thus, the term 'progressively' as detailed in Article 2 of the ICESCR (which provides for the need to 'achieve progressively the full realisation of the

⁷²² De Vos P 'Economic and social rights of children' (1995) 10 *SAPR/PL* 250.

⁷²³ Robertson R 'Measuring state compliance' (1994) 16 *Human Rights Quarterly* 701.

⁷²⁴ Limburg Principle 8.

⁷²⁵ De Vos P 'Economic and social rights of children' (1995) 10 *SAPR/PL* 250.

⁷²⁶ De Vos P 'Economic and social rights of children' (1995) 10 *SAPR/PL* 251.

⁷²⁷ De Vos P 'Economic and social rights of children' (1995) 10 *SAPR/PL* 251.

⁷²⁸ Liebenberg S 'The international covenant' *SAJHR* (1995) 365.

⁷²⁹ Limburg Principle 21.

rights') should not be construed as exempting a state from immediately meeting the minimum subsistence needs of its people.⁷³⁰ Furthermore, it should be noted that the aforementioned statement/version is the favoured interpretation regarding the progressive realisation of socio-economic rights.⁷³¹

The abovementioned insights (with specific reference to the Limburg principles and the cited sections of the ICESCR) point to an obligation on the part of the state to access both public and private resources to the extent required to satisfy the 'core' entitlements of its people as a matter of urgency.⁷³² Consequently, it could be argued that every state has to counter a rebuttable presumption that it is capable of providing for the subsistence requirements of all of its people if it defined resources broadly enough and subsequently launched an aggressive campaign to secure the required resources.⁷³³ The State Party is deemed to be 'under a minimum core obligation' to give effect to critical levels of rights such as 'basic nutrition, primary health-care, shelter and basic education'.⁷³⁴ A failure on the part of the State Party to provide the aforementioned basic needs makes it near impossible to lead a dignified human existence which is why it is understandably viewed as a *prima facie* breach of the obligations flowing from the Covenant.⁷³⁵ Thus, the State Party has 'an increased justificatory burden to demonstrate' that it has tried its utmost to marshal all of its resources to give effect to these minimum obligations.⁷³⁶

It is a formidable and unenviable task to attempt to assess the performance of the state by defining and ascertaining the maximum

⁷³⁰ Robertson R 'Measuring state compliance' (1994) 16 *Human Rights Quarterly* 701.

⁷³¹ Robertson R 'Measuring state compliance' (1994) 16 *Human Rights Quarterly* 701.

⁷³² Robertson R 'Measuring state compliance' (1994) 16 *Human Rights Quarterly* 701.

⁷³³ Robertson R 'Measuring state compliance' (1994) 16 *Human Rights Quarterly* 701.

⁷³⁴ Liebenberg S 'The international covenant' *SAJHR* (1995) 366.

⁷³⁵ Liebenberg S 'The international covenant' *SAJHR* (1995) 366.

⁷³⁶ Liebenberg S 'The international covenant' *SAJHR* (1995) 367.

available resources of the state - a possible way of negotiating this challenge is to measure the performance of the state against recognised standards of resource utilisation (which is viewed as a reliable indicator of compliance).⁷³⁷ Nonetheless, the underlying purpose of this brief discussion is to highlight the nature and (possible) extent of the accountability of the state in realising the socio-economic rights of its people by demonstrating its unwavering political will to dramatically improve the lives of its most vulnerable people. The aforementioned political will and accountability on the part of the state will be demonstrated by giving effect to the broadest possible meaning of available state resources (as well as providing the public with the necessary information on an ongoing basis) as a means of giving effect to the progressive realisation of critical socio-economic rights.

The UN Committee has emphasised the usefulness of a state providing detailed benchmarks against which its performance in a specific sector can be assessed.⁷³⁸ It would be difficult, in the absence of the aforementioned benchmarks, to determine the level of progress the state is making in discharging its duties to advance socio-economic rights.⁷³⁹ This is in keeping with the accountability standard sought by Bilchitz in championing the minimum core obligation approach to advance urgent subsistence rights.⁷⁴⁰ Consequently, the relevant State Party should take steps that are 'deliberate, concrete and targeted' in discharging the obligations provided for in the ICESCR.⁷⁴¹ Thus, there will be an expectation on the part of State Parties' that they furnish the UN Committee with details as to the measures adopted as well as the underlying reasons for those same measures to be viewed as the most

⁷³⁷ Robertson R 'Measuring state compliance' (1994) 16 *Human Rights Quarterly* 703.

⁷³⁸ *General Comment No. 1 at Point 6*: <http://www.refworld.org/docid/4538838b2.html>, (accessed 1 August 2016) (hereafter General Comment No 1).

⁷³⁹ *General Comment No 1 at Point 6* <http://www.refworld.org/docid/4538838b2.html>, (accessed 1 August 2016).

⁷⁴⁰ Please see Section 3.5.

⁷⁴¹ *General Comment No. 3 at Point 2* <http://www.refworld.org/docid/4538838b2.html>, (accessed 1 August 2016).

‘appropriate’ given the particular circumstances.⁷⁴² In this regard it should be noted that legislation is not mandatory but it should be viewed as serving a critical need.⁷⁴³ However, there are certain instances where legislation is indeed necessary to achieve a specific result (as pertaining to the realisation of a right).⁷⁴⁴

The State Party is also required to take ‘other measures’ necessary to give effect to its obligations.⁷⁴⁵ This is due to the fact that the enactment of legislation alone is often not sufficient to achieve the desired result.⁷⁴⁶ Thus, the state has a substantial challenge to overcome in seeking to justify an infringement of a concrete duty (with reference to an internal limitations clause) in the absence of legislative enactments and ‘other measures’.⁷⁴⁷ The State Party should consequently take decisive steps to realise rights as ‘expeditiously and effectively as possible’.⁷⁴⁸ Furthermore, the State Party is obliged to refrain from implementing retrogressive measures.⁷⁴⁹ However, in the event that the State Party seeks to give effect to a retrogressive measure, then it would entail ‘the most careful consideration and would need to be fully justified by reference to the totality of rights provided for in the Covenant and in the context of the full use of the maximum available resources’.⁷⁵⁰ In addition, the drafters of the ICESCR intended for the phrase ‘to the maximum of its available resources’ to be construed as resources that

⁷⁴² General Comment No. 3 at Point 2: <http://www.refworld.org/docid/4538838b2.html>, (accessed 1 August 2016).

⁷⁴³ General Comment No. 3 at Point 3: <http://www.refworld.org/docid/4538838b2.html>, (accessed 1 August 2016).

⁷⁴⁴ General Comment No. 3: <http://www.refworld.org/docid/4538838b2.html>, (accessed 1 August 2016).

⁷⁴⁵ General Comment No. 3: <http://www.refworld.org/docid/4538838b2.html>, (accessed 1 August 2016).

⁷⁴⁶ General Comment No. 3: <http://www.refworld.org/docid/4538838b2.html>, (accessed 1 August 2016).

⁷⁴⁷ General Comment No. 3: <http://www.refworld.org/docid/4538838b2.html>, (accessed 1 August 2016).

⁷⁴⁸ General Comment No. 3: <http://www.refworld.org/docid/4538838b2.html>, (accessed 1 August 2016).

⁷⁴⁹ General Comment No. 3: <http://www.refworld.org/docid/4538838b2.html>, (accessed 1 August 2016).

⁷⁵⁰ General Comment No. 3 at Point 9: <http://www.refworld.org/docid/4538838b2.html>, (accessed 1 August 2016).

are to be found both within a State as well those accessible through the international community by way of cooperation and assistance.⁷⁵¹

The critical insight offered by De Vos in highlighting that ‘there is no need for courts to abdicate their responsibility as there are clear rules and practices to give content to this right in line with international human rights norms’ cannot be faulted.⁷⁵² Yet, that is ostensibly what the Constitutional Court has done on a number of occasions which has effectively undermined the realisation of those same rights. In this regard the discussion by Roux, relating to the Separation of Powers Doctrine, offers illuminating insights.⁷⁵³

It is my contention that public officials should embrace ubuntu as a conscious political choice so as to honour communal obligations. This is critical in realising an accountability standard which is aligned to our international law obligations (i.e. ICESCR commitments) and specifically modified so as to give effect to the constitutionally guaranteed subsistence rights in the Constitution (i.e. giving effect to the minimum core obligation approach as proposed by Bilchitz).⁷⁵⁴

Section 39 specifically requires that international law must be considered in interpreting the Bill of Rights (as previously stated) but it does not expressly provide the manner in which the courts should give effect to this provision.⁷⁵⁵ However, section 233 provides additional clarity as to the substantive interpretive role of international law as follows: ‘When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any interpretation that is inconsistent with international law’.⁷⁵⁶ Furthermore, the aforementioned section has striking similarities with the final two paragraphs of General Comment 9 which is an expression of

⁷⁵¹ *General Comment No. 3*: <http://www.refworld.org/docid/4538838e10.html>, (accessed 1 August 2016).

⁷⁵² De Vos ‘Pious wishes’ *SAJHR* (1997) 98.

⁷⁵³ Please see Section 3.6.5.1.

⁷⁵⁴ Please see Section 3.5.

⁷⁵⁵ Scott C & Alston P ‘Adjudicating constitutional priorities’ *SAJHR* (2000) 221.

⁷⁵⁶ Section 233 of the Constitution of the Republic of South Africa, 1996.

international human rights law and is aligned with the law of the ICESCR.⁷⁵⁷ Consequently, Scott and Alston state that:

‘Within the limits of the appropriate exercise of their functions of judicial review, courts should take account of the Covenant rights where this is necessary to ensure that the State’s conduct is consistent with its obligations under the Covenant. Neglect by the courts of this responsibility is incompatible with the principle of the rule of law, which must always be taken to include respect for international human rights obligations.’⁷⁵⁸

Furthermore, the aforementioned authors rightfully emphasise that ‘It is generally accepted that domestic law should be interpreted as far as possible in a way which conforms to a State’s international legal obligations’.⁷⁵⁹ Thus, when a domestic decision-maker is faced with a choice between an interpretation of domestic law that would place the State in breach of the Covenant and one that would enable the State to comply with the Covenant, international law requires the choice of the latter.⁷⁶⁰ Also, guarantees of equality and non-discrimination should be interpreted, to the greatest extent possible, in ways which facilitate the full protection of economic, social and cultural rights.⁷⁶¹

Consequently, Scott and Alston believe that the duty to progressively give effect to human rights includes the obligation to advance a specific prioritisation of a core minimum entitlement without delay.⁷⁶² Thus, the aforementioned authors are keen to emphasise that to interpret the principle of progressive realisation as inconsistent with immediate obligations to give effect to critical safeguards ‘would be, in effect, to

⁷⁵⁷ General Comment No. 9: The domestic application of the Covenant: <http://www.refworld.org/docid/47a7079d6.html>, (accessed 1 August 2016).

⁷⁵⁸ Scott C & Alston P ‘Adjudicating constitutional priorities’ *SAJHR* (2000) 221.

⁷⁵⁹ Scott C & Alston P ‘Adjudicating constitutional priorities’ *SAJHR* (2000) 221.

⁷⁶⁰ Scott C & Alston P ‘Adjudicating constitutional priorities’ *SAJHR* (2000) 221.

⁷⁶¹ Scott C & Alston P ‘Adjudicating constitutional priorities’ *SAJHR* (2000) 221.

⁷⁶² Scott C & Alston P ‘Adjudicating constitutional priorities’ *SAJHR* (2000) 227. Please see General Comment No. 3: <http://www.refworld.org/docid/4538838e10.html>, (accessed 1 August 2016).

conceptualise duties to ensure positive rights as never capable of being violated, as constantly receding into the future'.⁷⁶³ This is a critical insight as it speaks to the accountability of the state to realise critical subsistence rights immediately (or in the near future) as well as testing the political will of the state in prioritising the urgent needs of vulnerable groups.

In conclusion, the Constitutional Court should at the very least exercise the option to assess whether the procedural requirements of the obligation to give effect to human rights progressively has been adhered to by the state and whether:

‘the obligation to compile the required information to ascertain the nature and extent of the need accurately; the obligation to devise benchmarks so as to confirm the minimum entitlements in their societal context; the capacity to accurately analyse information as a means to determine which people and groups have the greatest demonstrated need; and the need to draw up targeted plans of action (linking service delivery objectives both to the raising of financial resources and budgetary allocations) so as to progressively cater for the needs of everyone while providing for the needs of the most disadvantaged groups and those experiencing acute suffering on a priority basis’.⁷⁶⁴

In this regard, General Comment 1 provides considerable detail as to the procedural obligations that are so critical in giving effect to substantive rights and stipulates that State Parties may not plead financial hardship as a defence in failing to devise/implement this procedural framework.⁷⁶⁵ Thus, the aforementioned insight informs the firm expectation that the public can harbour in relation to a State Party professing to prioritise the

⁷⁶³ Scott C & Alston P ‘Adjudicating constitutional priorities’ *SAJHR* (2000) 227.

⁷⁶⁴ Scott C & Alston P ‘Adjudicating constitutional priorities’ *SAJHR* (2000) 254.

⁷⁶⁵ General Comment No. 1: Reporting by States Parties:
<http://www.refworld.org/docid/4538838b2.html>, (accessed 1 August 2016).

urgent needs of vulnerable groups as a vivid demonstration of its political will (in striving to forge a just and caring nation-state). Furthermore, it is submitted that the relevant General Comments provide State Parties with definitive clarity on the manner in which critical socio-economic rights should be prioritised and subsequently realised in an environment of scarce resources.

3.5 The minimum core obligation approach in relation to subsistence rights in the ICESCR

It should be noted at the outset that there is an unfaltering focus on the minimum core obligation approach in this thesis. It is my firm contention that the minimum core obligation approach provides a powerful and transparent mechanism to compel the state to do so much more in meeting the critical needs of vulnerable groups in South Africa. In addition, General Comment 3, as issued by the UN Committee, provides a persuasive account as to the suitability of the minimum core obligation approach in bringing about beneficial change for vulnerable groups.⁷⁶⁶ Furthermore, the minimum core obligation approach as advanced by Bilchitz is specifically endorsed in this thesis. This is as a result of Bilchitz's unrelenting insistence on the state driving the realisation of critical socio-economic rights – this should be in line with guidance (that should be on offer) by the Constitutional Court through developing critical determinate content for socio-economic rights. Furthermore, it is submitted that the communal obligations' focus of ubuntu finds expression in the underlying philosophy of the minimum core obligation approach in seeking to stave off threats to vulnerable groups in the community/nation-state.

The minimum core obligation approach serves to cast light on the duties owed by the state to its people which resonates with the communal obligations' focus of ubuntu in highlighting the duties owed by a member (to every other member of the community/nation-state) as a means to forge and sustain a viable community/nation-state. Thus, it is submitted

⁷⁶⁶ General Comment No. 3: <http://www.refworld.org/docid/4538838e10.html>, (accessed 1 August 2016).

that the minimum core obligation approach will serve to facilitate the progressive realisation of those same critical subsistence rights in the shortest possible time. It is noted that the aforementioned minimum core obligation has met with resistance in various quarters (including relevant Constitutional Court judgments). However, it will be interrogated in this thesis as a means to benchmark a suitable accountability standard for public officials to give effect to their duties in relation to the progressive realisation of urgent socio-economic rights.

Bilchitz believes that the interpretation (and enforcement) of socio-economic rights is best served by utilising a revised version ⁷⁶⁷ of the minimum core approach as endorsed by the UN Committee in its 3rd General Comment.⁷⁶⁸ Bilchitz emphasises the need for further bolstering of the minimum core approach (as adopted by the aforementioned UN Committee) in order to consolidate the underlying rationale of the normative approach and to explore the full implications of the approach.⁷⁶⁹

It follows that one should distinguish ‘between the two thresholds of interests that individuals have’ so as to give priority to the realisation of the first threshold.⁷⁷⁰ Consequently, the state would need to provide extremely persuasive justification to defend its inability to meet the most basic needs of its people in the event that the state is unable to meet the first threshold.⁷⁷¹ Furthermore, a nuanced understanding of the normative basis of socio-economic rights can make a telling contribution in assisting judges and ‘other actors in society’ to ascertain the content of these rights and facilitate their constructive enforcement.⁷⁷² Thus, a modified minimum core approach (with the relevant political and philosophical underpinnings suitably intact and properly justified)

⁷⁶⁷ Bilchitz D *Poverty and Fundamental Rights* (2007) 5.

⁷⁶⁸ General Comment No. 3: <http://www.refworld.org/docid/4538838e10.html> (accessed 1 August 2016).

⁷⁶⁹ Bilchitz D *Poverty and Fundamental Rights* (2007) 5.

⁷⁷⁰ Bilchitz D *Poverty and Fundamental Rights* (2007) 5. Please see Brand D ‘What Are Socio-Economic Rights For?’ (2003) 35.

⁷⁷¹ Bilchitz D *Poverty and Fundamental Rights* (2007) 5.

⁷⁷² Bilchitz D *Poverty and Fundamental Rights* (2007) 5.

provides a sound framework within which to interpret socio-economic rights.⁷⁷³ Furthermore, a 'thin' theory of good is advocated as complemented by an assortment of experiences and purposes that individuals value and strive to attain.⁷⁷⁴

The first rationale underlying the minimum core obligation approach is that of the principled minimum core which is consistent with the minimum core obligation as explored in this thesis and refers to 'minimum essential levels of the right'.⁷⁷⁵ It should be noted at the outset that the minimum core obligation does not 'encompass the resources to live a decent life or a dignified life in a community, but rather the basic resources that allow people to move beyond starvation, thirst and homelessness'.⁷⁷⁶ This should be contrasted with the second rationale (underlying the minimum core obligation approach) which seeks to remedy the absence of practical benchmarks to assess the performance of the state in addressing the specific needs of the people.⁷⁷⁷ In this regard the principled minimum core can readily provide the appropriate benchmark in respect of food, water and housing.⁷⁷⁸ A case in point being the relative ease with which the amount of food required to prevent malnutrition can be determined.⁷⁷⁹

Furthermore, Bilchitz believes that it is likely that the provision of the required amount of food (to avoid malnutrition) is achievable within current resource constraints.⁷⁸⁰ Thus, it is my contention that the state should be held to account as to why it does not put an end to malnutrition immediately if it is indeed within its power to do so. In this regard it is my

⁷⁷³ Bilchitz D *Poverty and Fundamental Rights* (2007) 179.

⁷⁷⁴ Bilchitz D *Poverty and Fundamental Rights* (2007) 179.

⁷⁷⁵ Bilchitz D *Poverty and Fundamental Rights* (2007) 220.

⁷⁷⁶ Bilchitz D *Poverty and Fundamental Rights* (2007) 220.

⁷⁷⁷ Bilchitz D *Poverty and Fundamental Rights* (2007) 221.

⁷⁷⁸ Bilchitz D *Poverty and Fundamental Rights* (2007) 221.

⁷⁷⁹ Bilchitz D *Poverty and Fundamental Rights* (2007) 221.

⁷⁸⁰ Bilchitz D *Poverty and Fundamental Rights* (2007) 221. Please see 'Health and Health Care in South Africa – 20 Years after Mandela' Mayosi BM & Benatar SR *New England Journal of Medicine* (2014) 371: 1344 – 1353 for illuminating insights as to the manner in which persistent failures on the part of the state (to give effect to sustainable poverty alleviation measures) have impacted on all aspects of access to healthcare in South Africa.

firm belief that the state should at the very least demonstrate that it has marshalled all of its resources (as well as given effect to a coherent plan of action) in seeking to end malnutrition.

The proposed minimum core obligation theory is consequently able to differentiate between interests that are coloured by varying degrees of urgency and is able to pinpoint 'two different thresholds of need'.⁷⁸¹ Consequently, section 26 is used as an example to demonstrate that section 26(1)⁷⁸² should be viewed as a conditional right (to an interest/entitlement) but that resource scarcity represents a tangible threat to achieving that conditional right.⁷⁸³ In addition, section 27(1)(b) stipulates that everyone has the right to sufficient food while section 28(1)(c) guarantees children the right to basic nutrition as previously described. The minimum core philosophy (as applied to the aforementioned rights) will ensure that all people are able to secure sufficient food to ensure their survival against the threat of starvation.⁷⁸⁴ The state (in terms of the second threshold of the minimum core obligation) would need to ensure that all people have sufficient food to meet their comprehensive nutritional requirements so that those same people can direct their efforts to living lives of purpose.⁷⁸⁵

Consequently, it is contended that the Constitutional Court should embrace the minimum core approach (as modified by Bilchitz in drawing on the fundamental approach/principles of the ICESCR)⁷⁸⁶ so as to provide determinate content to socio-economic rights and insist upon the state providing clear, benchmarked targets with regards to the realisation of pressing subsistence rights. The Constitutional Court is best placed to provide the state with concrete guidance in order to realise

⁷⁸¹ Bilchitz D *Poverty and Fundamental Rights* (2007) 180.

⁷⁸² Section 26 (1) provides that 'Everyone has the right to have access to adequate housing.'

⁷⁸³ Bilchitz D *Poverty and Fundamental Rights* (2007) 182.

⁷⁸⁴ Bilchitz D *Poverty and Fundamental Rights* (2007) 246.

⁷⁸⁵ Bilchitz D *Poverty and Fundamental Rights* (2007) 246.

⁷⁸⁶ International Covenant <http://www.refworld.org/docid/3ae6b36c0.html>, (accessed 31 July 2016).

socio-economic rights as well as to insist upon judicial supervision if the circumstances warrant such an approach.⁷⁸⁷

It should be noted that De Wet is routinely cited as an outspoken critic of the minimum core obligation approach.⁷⁸⁸ De Wet believes that the assumption (with regards to the attendant financial implications not undermining the separation of powers doctrine) to be valid only if there is consensus as to the core content of basic nutrition, shelter, basic health care and social services.⁷⁸⁹ Furthermore, De Wet believes that the rights enshrined in s28(1)(c) cannot be enforced (without falling foul of the abovementioned division of state powers) due to the prohibitive financial costs which would have to be incurred by the state.⁷⁹⁰ In addition, De Wet believes that the right to basic nutrition can only be achieved at great cost to the state in light of an ever increasing population.⁷⁹¹ Thus, De Wet disputes the views of De Vos who has asserted that children's rights are directly enforceable.⁷⁹² Also, De Wet believes that De Vos has not considered the 'complexities' relating to the application of the separation of powers doctrine⁷⁹³ nor the prohibitive costs that would have to be borne by the state.⁷⁹⁴

I submit that the abovementioned insights offered by De Wet flow from a flawed understanding of the minimum core obligation approach. It is my contention that the approach of De Wet (in respect of the minimum core obligation approach) is myopic as it undermines the ability of the Constitutional Court to facilitate the progressive realisation of urgent socio-economic rights as enshrined in the Constitution. Also, De Wet's

⁷⁸⁷ Bilchitz D *Poverty and Fundamental Rights* (2007) Introduction.

⁷⁸⁸ De Wet E 'The constitutional enforceability of economic and social rights: the meaning of the German constitutional model for South Africa' (1996) 108 (hereafter *The constitutional enforceability of economic and social rights*).

⁷⁸⁹ De Wet E 'The constitutional enforceability of economic and social rights' (1996) 108.

⁷⁹⁰ De Wet E 'The constitutional enforceability of economic and social rights' (1996) 108.

⁷⁹¹ De Wet E 'The constitutional enforceability of economic and social rights' (1996) 109.

⁷⁹² De Wet E 'The constitutional enforceability of economic and social rights' (1996) 109.

⁷⁹³ Please see Section 3.6.5.1.

⁷⁹⁴ De Wet E 'The constitutional enforceability of economic and social rights' (1996) 109.

interpretation of the separation of powers doctrine demands excessive deference on the part of the judiciary to the executive and legislature. Furthermore, it is submitted that the Constitutional Court has a critical role to play in holding the other branches of government to account with respect to giving effect to critical subsistence rights.

Bilchitz has sought to assess the performance of the South African government in giving effect to its obligations (relating to socio-economic rights) by scrutinising the relevant judgments of the Constitutional Court. The Constitutional Court is deemed to have erred by embracing a reasonableness approach (as opposed to a minimum core approach) as related to socio-economic rights.⁷⁹⁵ Bilchitz has focused his attention on the rights to food, housing and health care which he has, as previously indicated, described as 'subsistence rights'.⁷⁹⁶ A critical shortcoming of the reasonableness approach, as adopted by the Constitutional Court in dealing with socio-economic rights, is the 'failure to provide much determinate content to such rights'.⁷⁹⁷ It is clear that the provision of determinate content is necessary to define the nature of the right and to develop a suitable accountability benchmark so as to determine the extent of the obligation owed by the state.⁷⁹⁸

A modified 'minimum core' interpretation of socio-economic rights is capable of providing the necessary legal basis for advancing the prioritisation of the aforementioned critical interests of vulnerable people.⁷⁹⁹ Consequently, it is indeed possible to address the needs of people living in abject poverty in South Africa (in the not too distant future) if there is a determined focus on prioritising the needs of vulnerable groups.⁸⁰⁰

Roux notes with interest that many South African legal academics had expressed concern that the Constitutional Court had not endorsed the

⁷⁹⁵ Bilchitz D *Poverty and Fundamental Rights* (2007) Introduction.

⁷⁹⁶ Bilchitz D *Poverty and Fundamental Rights* (2007) Introduction.

⁷⁹⁷ Bilchitz D *Poverty and Fundamental Rights* (2007) Introduction.

⁷⁹⁸ Bilchitz D *Poverty and Fundamental Rights* (2007) Introduction.

⁷⁹⁹ Bilchitz D *Poverty and Fundamental Rights* (2007) Introduction.

⁸⁰⁰ Bilchitz D *Poverty and Fundamental Rights* (2007) Introduction.

minimum core content approach which was viewed as 'an abdication of its responsibility' in giving effect to socio-economic rights.⁸⁰¹ In this regard Roux believes that 'much of the force of this criticism falls away once legal academics have accepted that the approach of the Constitutional Court in socio-economic rights cases has been to forge a review standard that permitted it greater flexibility in managing the relationship with the political branches.'⁸⁰² However, it should be noted that Roux does not display an exacting focus on the deprivation to be endured by vulnerable groups in light of the state failing in its duties to give effect to critical socio-economic rights. Nonetheless, it should suffice at this point to highlight that Roux does indeed provide a compelling account of the considerations at play in shaping the decision-making of a relatively new Constitutional Court in a fledgling democracy.⁸⁰³

A justification is advanced for the conditional rights enjoyed by every individual and how those same rights are transformed into unconditional rights if compelling normative and pragmatic factors are met.⁸⁰⁴ Thus, the state is tasked to embrace an 'all-things-considered consequentialist judgment' in identifying the unconditional obligations it owes its people so as to realise a vision in which it treats all individuals with equal importance.⁸⁰⁵ A theory of rights serves to emphasise that our obligations to others are predicated upon recognition of their urgent interests and embracing their lives as being of equal importance to our own.⁸⁰⁶ Also, a single-minded focus on obligations is (ostensibly) viewed as neglecting to emphasise the bond between ourselves and others who have interests that are of pivotal importance and how those same

⁸⁰¹ Roux T 'Principle and Pragmatism on the Constitutional Court of South Africa' *International Journal of Constitutional Law* 136 (hereafter Principle and Pragmatism). Please see Brand D 'What Are Socio-Economic Rights For?' (2003) 46. Please also see De Vos P 'Grootboom' *SAJHR* (2001) 273.

⁸⁰² Roux T 'Principle and Pragmatism' *International Journal of Constitutional Law* 136.

⁸⁰³ Please see Section 3.6.5.1.

⁸⁰⁴ Bilchitz D *Poverty and Fundamental Rights* (2007) 4.

⁸⁰⁵ Bilchitz D *Poverty and Fundamental Rights* (2007) 4.

⁸⁰⁶ Bilchitz D *Poverty and Fundamental Rights* (2007) 73.

interests ultimately serve to confer obligations on us.⁸⁰⁷ However, a focus on obligations ensures that the agent and the required conduct are scrutinised.⁸⁰⁸ A case in point being the manner in which public officials should come to the aid of vulnerable groups so as to discharge their duties as enshrined in the Constitution. Consequently, it is my contention that embracing ubuntu entails the honouring of communal obligations as a rule and that we are consequently connected to every other person in the community by virtue of our shared humanity. Thus, it is submitted that the constant humanising acts as outlined by Praeg (such as public officials coming to the aid of vulnerable groups) is an expression of the aforementioned shared humanity which in turn colours and informs our understanding of ubuntu. The approach adopted by Bilchitz is capable of providing a clear accountability standard for public officials (with regards to the progressive realisation of socio-economic rights) while embracing ubuntu will ensure that those same public officials are diligent in advancing socio-economic rights (so as to give effect to communal obligations that will forge a just and caring nation-state in the time to come).

The inability to move directly from a recognition of fundamental rights to giving effect to such rights is acknowledged and defended by Bilchitz.⁸⁰⁹ It is the aforementioned inability that warrants a critical distinction being drawn between 'conditional rights' and 'unconditional rights'.⁸¹⁰ The transformation of conditional rights to unconditional rights (as shaped by the critical factors of scarcity, urgency, sacrifice, effectiveness and allocation) is acknowledged but it cannot be fully explored in this thesis.⁸¹¹ However, Bilchitz believes that there is a distinct possibility that securing rudimentary capabilities for all human beings (in a society defined by a moderate scarcity of resources such as South Africa) will

⁸⁰⁷ Bilchitz D *Poverty and Fundamental Rights* (2007) 73.

⁸⁰⁸ Bilchitz D *Poverty and Fundamental Rights* (2007) 74. Please see Zulu P *A Nation in Crisis* (2013) 20.

⁸⁰⁹ Bilchitz D *Poverty and Fundamental Rights* (2007) 75.

⁸¹⁰ Bilchitz D *Poverty and Fundamental Rights* (2007) 75.

⁸¹¹ Bilchitz D *Poverty and Fundamental Rights* (2007) 75.

exhaust all of society's resources in attaining the aforementioned capabilities.⁸¹² An examination of the capabilities approach is outside the scope of this thesis but it serves to demonstrate the need for the state to fully account as to the resources that it has at its disposal.

It is submitted that the need to account is a central theme in this thesis in exploring the nature and extent of the duties owed by the state to advance the aspirational values and socio-economic rights as enshrined in the Constitution. Bilchitz correctly asserts that a society committed to treating human beings with equal importance will prioritise meeting the most urgent needs of vulnerable individuals first.⁸¹³ Furthermore, the extent of the sacrifice that has to be endured by members of society is linked to the urgency of individual needs that are yet to be satisfied.⁸¹⁴

It should be noted that the courts in South Africa are expressly authorised to conduct judicial reviews.⁸¹⁵ Consequently, judges are empowered to scrutinise legislation or executive policies so as to confirm adherence with the relevant socio-economic provisions enshrined in the Constitution.⁸¹⁶ Thus, judges in South Africa are obliged to provide interpretations of the provisions of the Constitution which anchor rights in respect of housing, food, water and health care.⁸¹⁷ However, the current reasonableness approach adopted by the Constitutional Court (in interpreting socio-economic rights) is not only predicated on an unconvincing theoretical foundation but it could also result in negligible material change in the lives of the most vulnerable people over time.⁸¹⁸ It is submitted that the aforementioned 'negligible material change' is indeed the lived reality of vulnerable groups in present day South Africa.

⁸¹² Bilchitz D *Poverty and Fundamental Rights* (2007) 76.

⁸¹³ Bilchitz D *Poverty and Fundamental Rights* (2007) 86.

⁸¹⁴ Bilchitz D *Poverty and Fundamental Rights* (2007) 86.

⁸¹⁵ Please see sections 167(4), 167 (5), 169(a) and 172 of the Constitution of the Republic of South Africa, 1996.

⁸¹⁶ Bilchitz D *Poverty and Fundamental Rights* (2007) 135. Please see Section 3.6.5.1 for an expanded discussion of the Separation of Powers Doctrine.

⁸¹⁷ Bilchitz D *Poverty and Fundamental Rights* (2007) 136.

⁸¹⁸ Bilchitz D *Poverty and Fundamental Rights* (2007) 136.

The two different thresholds of the minimum core obligation are further expanded upon by utilising section 26 (1) which provides for a right to access adequate housing as previously described.⁸¹⁹ The first threshold is the more urgent concern as it seeks to safeguard an individual from threats to his/her survival (i.e. access to a rudimentary shelter that provides protection from inclement weather as well as offering access to running water and adequate sanitation).⁸²⁰ Consequently, the second threshold in the minimum core obligation approach is concerned with placing individuals in a position to live lives of value and this would as a rule entail the provision of housing that is tailored to give expression to the stated goals and purposes of individuals rather than crude, makeshift structures.⁸²¹ In this regard the Preamble to the Constitution seeks to 'improve the quality of life of all citizens and free the potential of each person'⁸²² and the state is thus duty-bound (and therefore accountable) to give effect to this aspirational vision (as previously stated).

In *Minister of Health v Treatment Action Campaign* ('TAC') the Constitutional Court held that section 27(1) 'does not give rise to a self-standing and independent positive right enforceable irrespective of the considerations mentioned in 27(2)'.⁸²³ However, the aforementioned view can be embraced without rejecting the minimum core approach as the latter approach does not require the recognition of two rights.⁸²⁴ The reality is that what the minimum core approach does in fact require is for one to grasp that a specific right can be provided for at different levels.⁸²⁵ Thus, the state could be compelled to urgently give effect to the minimum level of the specific right whilst seeking to progressively realise the full thrust of the same right over time.⁸²⁶ In addition, the minimum core approach is imbued with flexibility but for an unwavering insistence in

⁸¹⁹ Bilchitz D *Poverty and Fundamental Rights* (2007) 187.

⁸²⁰ Bilchitz D *Poverty and Fundamental Rights* (2007) 188.

⁸²¹ Bilchitz D *Poverty and Fundamental Rights* (2007) 188.

⁸²² Constitution of the Republic of South Africa, 1996.

⁸²³ *Minister of Health v Treatment Action Campaign* (2002) 5 SA 721 (CC) (hereafter TAC) para 39.

⁸²⁴ Bilchitz D *Poverty and Fundamental Rights* (2007) 207.

⁸²⁵ Bilchitz D *Poverty and Fundamental Rights* (2007) 208.

⁸²⁶ Bilchitz D *Poverty and Fundamental Rights* (2007) 208.

recognising that it is an abhorrent reality that fellow members of our society have to endure an existence in which their survival is under threat.⁸²⁷

Kende describes⁸²⁸ the manner in which Bilchitz took issue with the statement by the Constitutional Court that it was not possible to ascertain the 'minimum core' of the right to housing in *Grootboom*⁸²⁹ because Bilchitz believed that there were a number of key principles that were not in dispute.⁸³⁰ Kende also draws attention to Bilchitz's belief that every person has a right to a toilet, running water and shelter from the elements and that Bilchitz consequently believed that the remedy of the court was flimsy and reinforced the flawed approach of the state in not prioritising the needs of people in desperate need.⁸³¹ However, Kende believes that the criticisms of Bilchitz are flawed and lack perspective.⁸³² Firstly, Kende commends South Africa for placing socio-economic rights on the same footing with civil and political rights.⁸³³ He views this as an extraordinary development in the international human rights law arena in light of the fact that South Africa has 'virtually no history of a judicial role in such matters'.⁸³⁴ Furthermore, Kende states that the UN Committee has only utilised the minimum core to evaluate national compliance with the ICESCR.⁸³⁵ Kende contends that virtually no national judiciary has utilised the 'rigid' minimum core principle to confirm 'the illegal and remedial' nature of conduct undertaken by their own

⁸²⁷ Bilchitz D *Poverty and Fundamental Rights* (2007) 208.

⁸²⁸ Kende MS 'The South African Constitutional Court's construction of socio-economic rights: a response to critics' *Connecticut Journal of International Law* 617 (2004) 622 (hereafter A response to critics).

⁸²⁹ *Grootboom* (2000) para 33.

⁸³⁰ Bilchitz D 'Giving socio-economic rights teeth: the minimum core and its importance' 119 *SALJ* 484 (2002) 484 (hereafter Giving socio-economic rights teeth).

⁸³¹ Bilchitz D 'Giving socio-economic rights teeth' *SALJ* (2002) 488.

⁸³² Kende MS 'A response to critics' *Connecticut Journal of International Law* (2004) 622.

⁸³³ Kende MS 'A response to critics' *Connecticut Journal of International Law* (2004) 622.

⁸³⁴ Kende MS 'A response to critics' *Connecticut Journal of International Law* (2004) 622.

⁸³⁵ Kende MS 'A response to critics' *Connecticut Journal of International Law* (2004) 622.

government.⁸³⁶ Kende believes that critics cannot offer 'virtually any real world success in support of their position on their views on remedies'.⁸³⁷

However, it is submitted that Kende's views lack insight and fail to appreciate the manner in which a minimum core obligation approach can coax the state to deliver in terms of a clear standard and progressively give effect to the realisation of urgent socio-economic rights. It should be noted that one of the primary purposes of constitutional rights is to safeguard the fundamental rights of individuals by ensuring that they have access to shelter, food, water and health care at the very least.⁸³⁸ Thus, it is incumbent upon a society, which should attach equal importance to every individual, to be unrelenting in its pursuit of bringing about an end to deplorable living conditions.⁸³⁹ A critical insight that should be emphasised is that amongst the aforementioned group there are individuals/groupings of people (that by virtue of enduring a particularly precarious existence) should be targeted to receive priority assistance which is consistent with the philosophy of the minimum core approach in first dismantling threats to survival.⁸⁴⁰

The notion of weighted priority has two elements with the first concerned with emphasising that certain interests are prioritised by virtue of the critical value which we attach to them and that those same interests can only be blocked by compelling countervailing considerations that are in play.⁸⁴¹ The second element is described by Parfit as the 'priority view' which holds that the benefits that accrue to people are of greater significance the more disadvantaged those same people are.⁸⁴² However, it is critical to note that this view of weighted priority does not insist upon granting absolute priority to the interests of the most

⁸³⁶ Kende MS 'A response to critics' *Connecticut Journal of International Law* (2004) 622.

⁸³⁷ Kende MS 'A response to critics' *Connecticut Journal of International Law* (2004) 622.

⁸³⁸ Bilchitz D *Poverty and Fundamental Rights* (2007) 208.

⁸³⁹ Bilchitz D *Poverty and Fundamental Rights* (2007) 208.

⁸⁴⁰ Bilchitz D *Poverty and Fundamental Rights* (2007) 208.

⁸⁴¹ Bilchitz D *Poverty and Fundamental Rights* (2007) 208.

⁸⁴² Parfit D 'Equality and Priority' *Ratio* 10 (3) (1997) 202-21.

marginalised people.⁸⁴³ Nonetheless, it does insist upon their specific interests receiving special consideration.⁸⁴⁴

However, the minimum core obligation is perceived as demanding 'too much' as people who are in need have an individual right to insist upon immediate assistance from the government.⁸⁴⁵ Thus, Kende believes that Bilchitz is likely to endorse the view that each person in need 'is now entitled to basic housing provision, which the government is required to improve gradually over time'.⁸⁴⁶ Furthermore, Kende states that giving effect to the minimum core obligation would not be feasible as catering for the immediate need of all that required housing would exhaust all of the resources earmarked for 'basic health care, adequate education, food, and water'.⁸⁴⁷ In addition, Kende believes that scholars have ignored the fact that members of the Constitutional Court 'may not agree on a minimum core, or even whether one is desirable.'⁸⁴⁸

It is submitted that Kende has failed to grasp the underlying philosophy of the minimum core obligation approach. The aforementioned approach serves to hold the state accountable to furnish the public with comprehensive information as to its resources available for the realisation of urgent socio-economic rights and to progressively realise those same rights (in terms of benchmarked plans) in the shortest possible time. It should be noted that the Constitutional Court is the guardian of the Constitution and should consequently have an unerring focus on facilitating the realisation of constitutionally guaranteed socio-economic rights. Thus, the Constitutional Court should in fact provide determinate content for socio-economic rights for the benefit and guidance of the state (as well as the public) and in so doing honour the

⁸⁴³ Bilchitz D *Poverty and Fundamental Rights* (2007) 208.

⁸⁴⁴ Bilchitz D *Poverty and Fundamental Rights* (2007) 208.

⁸⁴⁵ Kende MS 'A response to critics' *Connecticut Journal of International Law* (2004) 622.

⁸⁴⁶ Kende MS 'A response to critics' *Connecticut Journal of International Law* (2004) 623.

⁸⁴⁷ Kende MS 'A response to critics' *Connecticut Journal of International Law* (2004) 623.

⁸⁴⁸ Kende MS 'A response to critics' *Connecticut Journal of International Law* (2004) 624.

relevant constitutional obligations as well as our contemporary international law commitments in terms of the ICESCR.

However, Bilchitz believes that it may be necessary to cap the resources allocated to a specific individual in seeking to uplift him/her to meet the minimal survival threshold.⁸⁴⁹ This is because the attainment of minimal interests must make allowance for interests to be realised beyond the minimum core as a means of ensuring that individuals are able to pursue lives of value.⁸⁵⁰ Consequently, the attainment of the minimum core of a specific right must not be pursued at the expense of achieving the minimum core in relation to other rights.⁸⁵¹ Thus, the minimum core approach, as proposed by Bilchitz, dovetails neatly with a pragmatic approach to governance in which the minimal interests of vulnerable people are embraced but not at the expense of casting more ambitious human projects to the periphery.⁸⁵²

It should be noted that the Constitutional Court has adduced no evidence to substantiate its belief that the state is unable to make available rudimentary shelter, food, water and life-saving healthcare in a short space of time.⁸⁵³ Consequently, it should be noted that the views expressed in *TAC*, as to the impossibility of effecting the realisation of the minimum core obligation by the Constitutional Court,⁸⁵⁴ is indicative of despair at the extent of the problem.⁸⁵⁵ It follows that the Constitutional Court should demand that the state provides persuasive evidence as to its inability to give effect to its minimum core obligations across the board before adopting a rigid position regarding the impossible nature of the task faced by the state.⁸⁵⁶

I am in complete agreement with Bilchitz as to the need for the Constitutional Court to demand that the state provides persuasive

⁸⁴⁹ Bilchitz D *Poverty and Fundamental Rights* (2007) 212.

⁸⁵⁰ Bilchitz D *Poverty and Fundamental Rights* (2007) 212.

⁸⁵¹ Bilchitz D *Poverty and Fundamental Rights* (2007) 212.

⁸⁵² Bilchitz D *Poverty and Fundamental Rights* (2007) 214.

⁸⁵³ Bilchitz D *Poverty and Fundamental Rights* (2007) 214.

⁸⁵⁴ *TAC* (2002) para 35.

⁸⁵⁵ Bilchitz D *Poverty and Fundamental Rights* (2007) 214.

⁸⁵⁶ Bilchitz D *Poverty and Fundamental Rights* (2007) 214.

justification (at the very least) for its stated position regarding its inability to comply with the minimum core obligation.⁸⁵⁷ There is a need to draw attention to the manner in which the Constitutional Court has demonstrated seemingly excessive deference to the other branches of government.⁸⁵⁸ It is my firm contention that the Constitutional Court should rather demonstrate an unwavering focus on holding the state accountable to give effect to the realisation of socio-economic rights in the present time and/or a definite time in the near future. This is consistent with the sentiments of Scott and Alston in avoiding a situation where the realisation of rights constantly 'recedes into the future'⁸⁵⁹ which is far removed from a nuanced understanding of the progressive realisation of socio-economic rights by the state.

The state should not be permitted to routinely place reliance on the 'scarcity of resources' defence without adducing compelling evidence of the same paltry resources in addition to providing benchmarked sectoral targets to remedy its shortcomings in the shortest possible timeframe.⁸⁶⁰ In this regard the Constitutional Court should demand persuasive proof whenever the state asserts that it is unable to meet the minimum subsistence needs of every person.⁸⁶¹ Furthermore, the Constitutional Court is well placed to insist that the state provides evidence as to how it will in fact remedy the situation in the shortest possible time.⁸⁶² Thus, I am in complete agreement with Bilchitz that the right in question should be fully articulated even if the state provides compelling proof that it does not possess the necessary resources.⁸⁶³ This will ensure that the state will be forced to act when additional resources become available.⁸⁶⁴

In addition, it should be noted that the measures implemented by the state to give effect to a specific right will only be deemed reasonable if

⁸⁵⁷ Bilchitz D *Poverty and Fundamental Rights* (2007) 214.

⁸⁵⁸ Please see Section 3.6.5.1.

⁸⁵⁹ Scott C & Alston P 'Adjudicating constitutional priorities' *SAJHR* (2000) 227.

⁸⁶⁰ Bilchitz D *Poverty and Fundamental Rights* (2007) 215.

⁸⁶¹ Bilchitz D *Poverty and Fundamental Rights* (2007) 215.

⁸⁶² Bilchitz D *Poverty and Fundamental Rights* (2007) 215.

⁸⁶³ Bilchitz D *Poverty and Fundamental Rights* (2007) 216.

⁸⁶⁴ Bilchitz D *Poverty and Fundamental Rights* (2007) 216.

they are directed at (as well as capable of responding to) the ‘minimum core needs of the most vulnerable members of society’.⁸⁶⁵ Thus, what is essentially required is for the state to produce evidence that a modicum of effort has been made (at the very least) to secure the realisation of ‘core minimum entitlements’.⁸⁶⁶ However, any policy instituted by the state to secure a specific right has to demonstrate the necessary balance and flexibility so as to provide for the needs of society as a whole rather than catering for only the most needy and vulnerable.⁸⁶⁷ The aforementioned insights offered by De Vos are indeed sound but it is my contention that the Constitutional Court should demand a more exacting standard of the state in giving effect to the progressive realisation of critical subsistence rights as guaranteed in the Constitution. Consequently, this will ensure that the state prioritises the critical needs of vulnerable groups whilst being mindful of broader societal needs.

Bilchitz believes that the minimum core obligation (with regards to healthcare) would include all measures that would safeguard individuals from all threats to their survival.⁸⁶⁸ Thus, this would entail not only providing primary healthcare but also compel the state to provide expensive medication as well as various medical treatments (e.g. heart transplants) where indicated.⁸⁶⁹ Consequently, Bilchitz believes that giving effect to the minimum core obligation in the health-care domain could lead to the budget of the state being exhausted to the detriment of less expensive critical needs such as housing and nutrition.⁸⁷⁰

It is my firm belief that Bilchitz erred in not adopting a suitably nuanced approach to the minimum core obligation in relation to healthcare. In this regard Bilchitz failed to demand that the state should account as to its available resources even if giving effect to the right in question was of such a scale that it seemingly threatened to overwhelm the resources of the state. Furthermore, it is fair comment that the state would not be able

⁸⁶⁵ De Vos P ‘Grootboom’ *SAJHR* (2001) 273.

⁸⁶⁶ De Vos P ‘Grootboom’ *SAJHR* (2001) 273.

⁸⁶⁷ De Vos P ‘Grootboom’ *SAJHR* (2001) 273.

⁸⁶⁸ Bilchitz D *Poverty and Fundamental Rights* (2007) 221.

⁸⁶⁹ Bilchitz D *Poverty and Fundamental Rights* (2007) 221.

⁸⁷⁰ Bilchitz D *Poverty and Fundamental Rights* (2007) 221.

to fund every available medical treatment/procedure with immediate effect but it could demonstrate an unerring will in progressively giving effect to the right of access to healthcare. This in turn could be achieved by devising (and giving effect to) a benchmarked health plan with firm (and stretch) targets. In this regard it is encouraging that President Ramaphosa offered the following insight during his celebrated maiden State of the Nation Address on 16 January 2018:

‘The time has now arrived to finally implement universal health coverage through the National Health Insurance. The NHI Bill is now ready to be processed through government and will be submitted to Parliament in the next few weeks. Certain NHI projects targeting the most vulnerable people in society will commence in April this year.’⁸⁷¹

However, it is submitted that it is only with the passing of time that one will be in a position to evaluate the effectiveness of NHI in meeting the pressing needs of vulnerable people (as related to access to healthcare) and whether there has been an enduring and positive shift in the accountability/political will of public officials (under the leadership of President Ramaphosa) in meeting the needs of vulnerable groups.

In this regard Moellendorf states that ‘the cost of providing needed medical resources to all citizens, unlike the costs of providing universal housing and access to food and water, may be limitless since the costs of new technology are high and resource needs will continue to grow as new treatments become available’.⁸⁷² Furthermore, Moellendorf believes that ‘if the costs of providing needed medical resources to all citizens is limitless, then clearly available resources are insufficient to meet all claims and a system of rationing available resources is

⁸⁷¹ <http://www.news24.com/SouthAfrica/News/full-text-now-is-the-time-to-lend-a-hand-says-president-cyril-ramaphosa-in-inaugural-sona2018-speech-20180216>, (accessed on 16 February 2018).

⁸⁷² Moellendorf D ‘Reasoning about resources: *Soobramoney* and the future of socio-economic rights claims’ 14 *SAJHR* 327 (1998) 332 (hereafter Reasoning about resources).

needed'.⁸⁷³ However, it should be noted that the UN Committee has stipulated that access to food, water and rudimentary shelter is included as part of the minimum core of the right to health as sustenance and shelter are critical for individuals not to be exposed to threats to their health.⁸⁷⁴

Consequently, the principled minimum core, with specific reference to health care, is deemed to be unsuitable in as far as outlining a set of practical standards against which state action can be assessed.⁸⁷⁵ Thus, it is deemed necessary to employ the concept of the 'pragmatic minimum threshold' which provides for a select number of practical minimum standards which the state has to give effect to in health care as an urgent priority.⁸⁷⁶ The pragmatic minimum threshold is shaped by a number of factors of which four are ever so briefly mentioned in the text to follow.⁸⁷⁷ The cost of the indicated treatment is a critical consideration.⁸⁷⁸ Secondly, the relevant resource constraints require careful consideration.⁸⁷⁹ Thirdly, there is a need to strike a balance between preventative and curative health-care interventions.⁸⁸⁰ Finally, there is a need to consider the effects of implementing a pragmatic minimum threshold in relation to giving effect to other critical needs in society.⁸⁸¹

It is of critical importance for the state to demonstrate an unerring focus on realising the minimum core obligation in health care (as a starting point) for all as a reflection of the just and caring nation-state being forged over time. Consequently, the state should at the very least provide a transparent account of its available resources and implement a benchmarked plan to progressively realise urgent health care rights in the shortest possible time. Thus, the public cannot (and should not) have

⁸⁷³ Moellendorf D 'Reasoning about resources' *SAJHR* (1998) 332.

⁸⁷⁴ Moellendorf D 'Reasoning about resources' *SAJHR* (1998) 332.

⁸⁷⁵ Bilchitz *D Poverty and Fundamental Rights* (2007) 223. Please see General Comment No. 14: The Right to the Highest Attainable Standard of Health: <http://www.refworld.org/docid/4538838d0.html>, (accessed 1 August 2016).

⁸⁷⁶ Bilchitz *D Poverty and Fundamental Rights* (2007) 223.

⁸⁷⁷ Bilchitz *D Poverty and Fundamental Rights* (2007) 223.

⁸⁷⁸ Bilchitz *D Poverty and Fundamental Rights* (2007) 223.

⁸⁷⁹ Bilchitz *D Poverty and Fundamental Rights* (2007) 223.

⁸⁸⁰ Bilchitz *D Poverty and Fundamental Rights* (2007) 223.

⁸⁸¹ Bilchitz *D Poverty and Fundamental Rights* (2007) 223.

the expectation that a state with moderately scarce resources will provide cutting-edge medical treatment immediately and/or on demand. However, what can be demanded of the state is for it to demonstrate its accountability (and political will) by revealing the true extent of its available resources as well as the manner in which it has subsequently allocated those same resources to optimise the realisation of a critical subsistence right in terms of benchmarked sectoral plans. Furthermore, the aforementioned benchmarked plans should detail both targets as well as stretch targets (in the event that additional resources become available).

It should be noted that the UN Committee has provided a definition of the pragmatic minimum threshold as part of the right to health care.⁸⁸² However, the obligations that are stipulated are significantly deficient in meeting even the basic survival needs of people.⁸⁸³ A case in point being the exclusion of life-saving health-care such as surgery and attending to the treatment of life-threatening illnesses that are not the consequence of epidemic outbreaks.⁸⁸⁴

In conclusion, it should be noted that Bilchitz has proposed a philosophical theory of fundamental rights as a means to interpret and assess claims premised on socio-economic rights.⁸⁸⁵ He rightfully asserts that the aforementioned theory 'provides the normative underpinnings for a modified version of the minimum core approach⁸⁸⁶ to socio-economic rights'.⁸⁸⁷ Also, the theory provides a pivotal clarification in that the minimum core is properly defined as a conditional right that has its specific content shaped by the basic interests of

⁸⁸² General Comment No. 14: The Right to the Highest Attainable Standard of Health: <http://www.refworld.org/docid/4538838d0.html>, (accessed 1 August 2016).

⁸⁸³ Bilchitz D *Poverty and Fundamental Rights* (2007) 224.

⁸⁸⁴ Bilchitz D *Poverty and Fundamental Rights* (2007) 224. Please see General Comment No. 14: The Right to the Highest Attainable Standard of Health: <http://www.refworld.org/docid/4538838d0.html>, (accessed 1 August 2016).

⁸⁸⁵ Bilchitz D *Poverty and Fundamental Rights* (2007) 234.

⁸⁸⁶ General Comment No. 3: <http://www.refworld.org/docid/4538838e10.html>, (accessed 1 August 2016).

⁸⁸⁷ Bilchitz D *Poverty and Fundamental Rights* (2007) 234.

individual members in not being exposed to threats that put their survival at risk.⁸⁸⁸ Bilchitz rightfully believes that his modified version of the minimum core theory provides a robust and persuasive interpretation of the socio-economic rights enshrined in the Constitution and is able to withstand an assortment of objections.⁸⁸⁹ In addition, Bilchitz holds the view that his philosophical theory is theoretically sound and provides an analytical framework that can be employed to give effect to practical solutions as to the content of socio-economic rights.⁸⁹⁰

Furthermore, I am in agreement with Bilchitz that the state can prevent starvation as well as prevent death from prolonged exposure to the elements (by guaranteeing sufficient food and access to shelter respectively) in the near future if it elects to embrace the minimum core obligation.⁸⁹¹ In this regard Bilchitz states that:

‘This is not a utopian vision but one that is readily achievable. By taking socio-economic rights seriously, attending to the content thereof, and adopting appropriate institutional and enforcement mechanisms, it will be possible to ensure that the vision of a world without absolute poverty can be translated into reality’.⁸⁹²

The accountability of public officials (as the duly appointed representatives of the state) should be evaluated against the progressive realisation of socio-economic rights as enshrined in the Constitution. It follows that the Constitutional Court has a critical role to play in ensuring that public officials have demonstrated the necessary accountability in devising and subsequently executing benchmarked sectoral plans that progressively give effect to the aforementioned socio-economic rights. It follows that the minimum core obligation approach is favoured in this thesis as it is the embodiment of a philosophy which seeks to prioritise the critical needs of vulnerable groups as well as

⁸⁸⁸ Bilchitz D *Poverty and Fundamental Rights* (2007) 235.

⁸⁸⁹ Bilchitz D *Poverty and Fundamental Rights* (2007) 235.

⁸⁹⁰ Bilchitz D *Poverty and Fundamental Rights* (2007) 235.

⁸⁹¹ Bilchitz D *Poverty and Fundamental Rights* (2007) 236.

⁸⁹² Bilchitz D *Poverty and Fundamental Rights* (2007) 236.

casting light on the accountability of public officials in progressively giving effect to those same subsistence rights. Thus, it is submitted that the minimum core obligation approach dovetails neatly with the communal obligations' focus of ubuntu in that interconnected and interdependent members would inevitably focus on first dismantling threats which placed the survival of fellow members in jeopardy.

3.6 CHAPTER 3 – PART B (SOCIO-ECONOMIC RIGHTS JURISPRUDENCE IN THE CONSTITUTIONAL COURT)

3.6.1 Introduction

Chapter 3 (Part B) will focus on the socio-economic rights jurisprudence of the Constitutional Court as well as the role of the Court as the guardian of the Constitution.

Part B maintains an unwavering focus on the need for the Constitutional Court to provide the state with determinate content for key socio-economic rights so as to ensure that the state has the necessary guidance in meeting the critical needs of vulnerable groups. The role of ubuntu is explored in Part B in relation to the manner in which ubuntu can make a critical contribution in augmenting the accountability of public officials. Thus, this chapter will serve to highlight the pressing need to give effect to the progressive realisation of constitutionally guaranteed socio-economic rights as a means to cast light on the nature and extent of the duties owed by the state to the public.

It should be noted that there are striking parallels between the Preamble and the Bill of Rights in the Constitution (with specific reference to aspirational values and the attainment of socio-economic rights so as to create a sanctuary for all who dwell in South Africa) and the manner in which ubuntu has been defined in this thesis (i.e. the primacy of communal obligations) so as to facilitate the forging of a just and caring nation-state. Thus, if ubuntu can play a pivotal role in giving effect to the aforementioned just and caring nation-state (in which the interdependence and interconnectedness of members is acknowledged and celebrated) then it follows that ubuntu can make a meaningful contribution to the forging of social solidarity in South Africa.

It is submitted that the communal obligations' focus of ubuntu serves to inform and colour the approach adopted in this thesis in focussing on the duties of the state (to meet the needs of vulnerable groups) as a means of forging a just and caring nation-state which gives effect to social solidarity ideals.

The analysis in this thesis will be confined to specific aspects of the socio-economic rights jurisprudence of the Constitutional Court so as to maintain an unerring focus on the accountability of the state in giving effect to socio-economic rights. It is submitted that there is a pressing need to provide determinate content to socio-economic rights. It follows that it is only when the obligations of the state are clearly defined that one is well placed to demand that the state account for its failure to meet specific targets in the advancement of specific socio-economic rights.

In this regard the Bill of Rights contains directly enforceable socio-economic rights which will require judges 'to scrutinise and reject many of the accepted practices and assumptions in relation to judicial review'.⁸⁹³ Thus, the Bill of Rights is only likely to realise its true potential if 'judges will discover in themselves the courage and imagination to engage in these challenges'.⁸⁹⁴ De Vos believes that judges will find ample support in international human rights literature to sustain them on their journey to advance human rights in South Africa.⁸⁹⁵ It is submitted that the aforementioned insights by De Vos highlight the challenges that will have to be negotiated by the judiciary in giving effect to socio-economic rights as enshrined in the Constitution.

The inherent challenge in instituting litigation based upon individual rights is that it inevitably leads to scrutiny of the specific right rather than retaining a holistic perspective aimed at effecting an overarching allocation of resources which ensures that all individuals are treated with equal importance.⁸⁹⁶ Also, Bilchitz notes that 'where complex interlocking considerations arise, courts will often defer to those with the greatest competence in the area of budgetary allocation'.⁸⁹⁷ However, this should not be used as a decoy by the courts to evade their responsibility in ensuring that the allocation of budgets give effect to the

⁸⁹³ De Vos 'Pious wishes' *SAJHR* (1997) 101.

⁸⁹⁴ De Vos 'Pious wishes' *SAJHR* (1997) 101.

⁸⁹⁵ De Vos 'Pious wishes' *SAJHR* (1997) 101.

⁸⁹⁶ Bilchitz D *Poverty and Fundamental Rights* (2007) 231.

⁸⁹⁷ Bilchitz D *Poverty and Fundamental Rights* (2007) 233. Please see Section 3.6.5.1 for an expanded discussion of the Separation of Powers Doctrine.

progressive realisation of constitutionally protected rights.⁸⁹⁸ Thus, Bilchitz rightfully believes that an unwillingness on the part of the Constitutional Court to provide content for socio-economic rights has undermined the effectiveness and extent of possible practical outcomes.⁸⁹⁹ Consequently, Bilchitz believes that the Constitutional Court has (more often than not) provided flawed and/or inadequate remedies in countering the rights violations inflicted upon vulnerable groups.⁹⁰⁰

It is of the utmost importance that the Constitutional Court provides determinate content for socio-economic rights and scrutinises the relevant state policies against giving effect to those rights.⁹⁰¹ It follows that the state should have more leeway in realising the second threshold as compared to the first threshold.⁹⁰² Consequently, any defence raised by the state as to its inability to cater for even the first threshold (due to a purported scarcity of resources) should be carefully evaluated as it would inevitably threaten the survival of vulnerable groups.⁹⁰³

The aforementioned scrutiny visited upon the state (as a consequence of claiming that it is unable to meet the first threshold regarding critical socio-economic rights) should be similar to the scrutiny that the state would have to endure if it claimed that it could not afford to host an election or provide a functioning court system.⁹⁰⁴ In this regard it is improbable that more than a handful of countries could defend not implementing the first threshold.⁹⁰⁵ Furthermore, the courts have demonstrated their willingness to adjudicate as to whether the state has given effect to constitutional guarantees pertaining to civil and political

⁸⁹⁸ Bilchitz D *Poverty and Fundamental Rights* (2007) 233.

⁸⁹⁹ Bilchitz D *Poverty and Fundamental Rights* (2007) 233.

⁹⁰⁰ Bilchitz D *Poverty and Fundamental Rights* (2007) 233. Please see Brand D 'What Are Socio-Economic Rights For?' (2003). Please also see Pillay K 'Implementation of Grootboom: Implications for the enforcement of socio-economic rights' (2003) *Law, Democracy and Development* 258 (hereafter Implications for the enforcement of socio-economic rights).

⁹⁰¹ Bilchitz D *Poverty and Fundamental Rights* (2007) 234.

⁹⁰² Bilchitz D *Poverty and Fundamental Rights* (2007) 234.

⁹⁰³ Bilchitz D *Poverty and Fundamental Rights* (2007) 234.

⁹⁰⁴ Bilchitz D *Poverty and Fundamental Rights* (2007) 234.

⁹⁰⁵ Bilchitz D *Poverty and Fundamental Rights* (2007) 234.

rights.⁹⁰⁶ Thus, the same standard should be utilised (at the very least) by the Court in assessing the conduct of the state in giving effect to critical socio-economic rights.⁹⁰⁷

Chaskalson P sought to emphasise the critical need for the Constitution to be interpreted 'in the light of our own history and conditions with due regard to the aspirations articulated in it'.⁹⁰⁸ In this regard the Constitutional Court has generally utilised a purposive approach in interpreting the Bill of Rights.⁹⁰⁹ However, the Constitutional Court has demonstrated reluctance to explore the reasons for the inclusion of socio-economic rights in the Bill of Rights (including the fact that they are on an equal footing with traditional civil and political rights).⁹¹⁰ Thus, determinate content of socio-economic rights has not been forthcoming from the Constitutional Court.⁹¹¹ The jurisprudence of the Court (relating to socio-economic rights) will consequently be analysed to highlight the manner in which the Constitutional Court has failed to demonstrate definitive insight as to the rationale for including those same rights in the Constitution.⁹¹² Also, the Court has omitted to provide the necessary content to socio-economic rights and its decisions are perceived as flimsy in the theoretical sense.⁹¹³

The approach of the Constitutional Court in adjudicating matters pertaining to socio-economic rights has insulated it from the harsh realities of hunger, homelessness and disease.⁹¹⁴ Brand is correct in stating that this is due to the Constitutional Court focusing on whether good governance standards (e.g. legality, coherence and inclusivity) are apparent in the conduct of the state.⁹¹⁵ However, the focus should rather

⁹⁰⁶ De Vos P 'Economic and social rights of children' (1995) 10 *SAPR/PL* 244.

⁹⁰⁷ De Vos P 'Economic and social rights of children' (1995) 10 *SAPR/PL* 244.

⁹⁰⁸ Chaskalson P 'Opening Address' *Acta Juridica* 1-7 (1998).

⁹⁰⁹ Bilchitz D *Poverty and Fundamental Rights* (2007) 178.

⁹¹⁰ Bilchitz D *Poverty and Fundamental Rights* (2007) 178.

⁹¹¹ Bilchitz D *Poverty and Fundamental Rights* (2007) 178.

⁹¹² Bilchitz D *Poverty and Fundamental Rights* (2007) 178.

⁹¹³ Bilchitz D *Poverty and Fundamental Rights* (2007) 178.

⁹¹⁴ Brand D 'What are socio-economic rights for?' (2003) 36.

⁹¹⁵ Brand D 'What are socio-economic rights for?' (2003) 36. Please see *Soobramoney* (1998) para 29 and *Grootboom* (2000) para 41. Please also see *TAC* (2002) para 36.

be on the deprivation endured by vulnerable groups as well as the demonstrable failure of the state to eradicate the aforementioned deprivation progressively over time.⁹¹⁶ In this regard Brand supports the view of Michelman in that the most urgent challenge that poverty-stricken people endure is the poverty itself as evidenced by gnawing hunger, homelessness and/or disease rather than their relative position on the socio-economic ladder.⁹¹⁷ Thus, the scourge of poverty consists of a number of absolute deprivations and that ‘... cause for concern is not found in some repugnant discrimination which may accompany a deprivation, but in the deprivation itself’.⁹¹⁸ It follows that the fight against poverty should be viewed as giving effect to the creation of a society that seeks first and foremost to provide for the basic needs of everyone so as to shield everyone against unyielding deprivation.⁹¹⁹

I am in agreement with Brand that the approach adopted by the Constitutional Court in relation to the adjudication of socio-economic rights is disappointing.⁹²⁰ However, Brand admits that he partly understands the rationale for the path followed by the Court.⁹²¹ In this regard he refers to the nature of the relationship of the Court with the political branches (which he believes to be suitably explored by Roux⁹²²) as well as its formalist interpretation of the law as a rule.⁹²³ Thus, Brand fully supports the contribution by De Vos regarding the need for ‘innovation in judicial method and mindset’ (as previously described) if the adjudication of socio-economic rights are to become an effective way of eradicating poverty.⁹²⁴

⁹¹⁶ Brand D ‘What are socio-economic rights for?’ (2003) 35.

⁹¹⁷ Michelman F ‘On protecting the poor through the Fourteenth Amendment’ 83 *Harvard LR* (1969) 7.

⁹¹⁸ Michelman F ‘On protecting the poor through the Fourteenth Amendment’ 83 *Harvard LR* (1969) 8.

⁹¹⁹ Brand D ‘What are socio-economic rights for?’ (2003) 36.

⁹²⁰ Brand D ‘What are socio-economic rights for?’ (2003) 51.

⁹²¹ Brand D ‘What are socio-economic rights for?’ (2003) 51.

⁹²² Please see Section 3.6.5.1.

⁹²³ Brand D ‘What are socio-economic rights for?’ (2003) 51.

⁹²⁴ Brand D ‘What are socio-economic rights for?’ (2003) 52.

De Vos highlights the challenge of developing an enhanced understanding of the duties imposed by socio-economic rights without a definitive grasp of the manner in which the Constitutional Court has developed the concept of substantive equality.⁹²⁵ It is indeed necessary to embrace the belief that the right to equality (which is linked in perpetuity with human dignity) and socio-economic rights 'are two sides of the same coin'.⁹²⁶ Thus, it should be noted that both equality and socio-economic rights have been enshrined in the Bill of Rights to bring about the realisation of the same objective (i.e. 'the creation of a society in which all people can achieve their full potential as human beings, despite apparent differences created by race, gender, disability and sexual orientation, and despite differences in the social and economic status of such individuals').⁹²⁷ Furthermore, Pierre de Vos believes that it is not only the realisation of the aforementioned objective that matters but also the manner in which the objective is realised so as to ensure that all conduct by the state (or other relevant party) can pass constitutional muster.⁹²⁸

In conclusion, the right to equality must be understood as obliging the state to take steps towards forging a society in which individuals can achieve their maximum potential.⁹²⁹ Thus, the critical importance of the aforementioned contextual approach (in discerning the true nature of equality) makes it necessary for the courts to ascertain 'the actual impact of an alleged violation of the right to equality on the individual within and outside different socially relevant groups in relation to prevailing social, economic and political circumstances'.⁹³⁰

⁹²⁵ De Vos P 'Grootboom' *SAJHR* (2001) 265.

⁹²⁶ De Vos P 'Grootboom' *SAJHR* (2001) 265.

⁹²⁷ De Vos P 'Grootboom' *SAJHR* (2001) 265.

⁹²⁸ De Vos P 'Grootboom' *SAJHR* (2001) 265.

⁹²⁹ De Vos P 'Grootboom' *SAJHR* (2001) 266.

⁹³⁰ De Vos P 'Grootboom' *SAJHR* (2001) 266.

3.6.2 An analysis of the *Soobramoney* case as a means to demonstrate the obligations of the state in facilitating the progressive realisation of critical socio-economic rights

There is a specific focus on the *Soobramoney*⁹³¹ judgment in this thesis as a means to accurately showcase both the obligations of the state as well as the consequences of the (subsequent) failure on the part of the Constitutional Court to hold the state to account. It is submitted that public officials that have embraced ubuntu would have done so much more in striving to stave off the threat to Mr Soobramoney's life as a means to honour their communal obligations through giving effect to key constitutionally guaranteed rights. Furthermore, the aforementioned case is of considerable academic interest as it explores the manner in which public officials that embrace ubuntu should assume responsibility for the well-being of vulnerable groups and strive to avoid the recurrence of the human tragedy described below.

The Constitutional Court considered the right of access to health care in *Soobramoney* on 11 November 1997.⁹³² The appellant, Mr Soobramoney, was 41 years old, unemployed and had a history of heart disease as well as cerebro-vascular disease.⁹³³ He had suffered a stroke in 1996 and in the same year his kidneys had stopped functioning.⁹³⁴ His medical condition was deemed irreversible and he was diagnosed as being in the final stages of chronic renal failure.⁹³⁵ It was common knowledge that his life could be prolonged by means of regular renal dialysis.⁹³⁶ He had previously received renal dialysis from private medical service providers⁹³⁷ but subsequently sought assistance from the state-run Addington Hospital⁹³⁸ when his personal savings had been exhausted. The abovementioned hospital utilised a set policy/checklist

⁹³¹ *Soobramoney* (1998).

⁹³² *Soobramoney* (1998) para 1.

⁹³³ *Soobramoney* (1998) para 1.

⁹³⁴ *Soobramoney* (1998) para 1.

⁹³⁵ *Soobramoney* (1998) para 1.

⁹³⁶ *Soobramoney* (1998) para 1.

⁹³⁷ *Soobramoney* (1998) para 5.

⁹³⁸ *Soobramoney* (1998) para 1.

with regards to the specific provision of renal dialysis treatment.⁹³⁹ The primary requirement for admission (in terms of the aforementioned policy) was that the patient had to be eligible for a renal transplant which required any prospective patient to be free from vascular and cardiac disease.⁹⁴⁰ Consequently, Mr Soobramoney was ineligible for renal dialysis treatment at Addington Hospital.⁹⁴¹

Mr Soobramoney appealed this decision with reference to section 11 ('the right to life') and section 27(3) ('No one may be refused emergency medical treatment') of the Constitution.⁹⁴² In this regard Moellendorf contends that a right to life, in the absence of additional specification, incorporates 'a duty of non-interference and claim against those who interfere or would interfere' but does not include an obligation to 'provide the sustenance of life'.⁹⁴³ He believes that the aforementioned reasoning is consistent with the Constitutional Court's understanding of the right to life in *Makwanyane*.⁹⁴⁴ Moellendorf states that no persuasive reason can be advanced to believe that a constitutionally protected right to life includes a right to life-sustaining medical treatment unless this is expressly incorporated in the formulation of the constitutional provision.⁹⁴⁵ However, Moellendorf is quick to assert that the claim of Mr. Soobramoney does in fact have a constitutional basis.⁹⁴⁶ Moellendorf consequently notes that Mr. Soobramoney should have appealed on the basis of section 27(1) as it would have compelled the court to consider 'what counts as reasonable legislative measures and how available resources are to be measured'.⁹⁴⁷

The Constitutional Court nonetheless issued its ruling on 27 November 1997 in which it denied Mr Soobramoney access to renal dialysis

⁹³⁹ *Soobramoney* (1998) para 3.

⁹⁴⁰ *Soobramoney* (1998) para 3.

⁹⁴¹ *Soobramoney* (1998) para 4.

⁹⁴² *Soobramoney* (1998) para 7.

⁹⁴³ Moellendorf D 'Reasoning about resources' *SAJHR* (1998) 327.

⁹⁴⁴ Moellendorf D 'Reasoning about resources' *SAJHR* (1998) 328.

⁹⁴⁵ Moellendorf D 'Reasoning about resources' *SAJHR* (1998) 328.

⁹⁴⁶ Moellendorf D 'Reasoning about resources' *SAJHR* (1998) 329.

⁹⁴⁷ Moellendorf D 'Reasoning about resources' *SAJHR* (1998) 329.

treatment.⁹⁴⁸ It should be noted that Mr Soobramoney tragically passed away on the 29th of November 1997. The notion advanced regarding the death of Mr Soobramoney being both 'just and tragic'⁹⁴⁹ is difficult to embrace as the Constitutional Court did not compel the state to adduce satisfactory evidence as to whether its resources were in fact insufficient to come to the aid of Mr Soobramoney. Furthermore, if the state had in fact adduced persuasive proof of extremely limited resources at its disposal (and had made every effort to come to the assistance of Mr Soobramoney without success) then one would be more inclined to speak of an unavoidable tragedy. Thus, it is submitted that it is more fitting to view the *Soobramoney* judgment as a failure to hold the state to account to the required standard in progressively realising socio-economic rights as included in the Constitution.

The *Soobramoney* judgment offers extraordinary insights regarding the accountability of the state in giving effect to subsistence rights as well as the overly deferential approach of the Constitutional Court in holding the state to account for the realisation of the aforementioned rights. Furthermore, it is of considerable interest that the Constitutional Court made no mention of ubuntu in the *Soobramoney* judgment even though there were such striking parallels with the earlier *Makwanyane* matter in which the death penalty was abolished.⁹⁵⁰ The reality is that the denial of dialysis treatment was tantamount to the imposition of a death sentence. Thus, the primary focus of this section of the thesis is to highlight the human tragedy that has unfolded over the better part of the past two decades. In addition, it is submitted that the communal obligations' focus of ubuntu should colour the decision-making of public officials in contemporary times so as to forge a just and caring society in which all people are treated as having equal worth. Consequently, this section will seek to demonstrate accountability failures on the part of the state (past and present) as well as highlight the flawed reasoning of the

⁹⁴⁸ *Soobramoney* (1998) para 36.

⁹⁴⁹ Furman K 'Ubuntu and the law' (2014) 160.

⁹⁵⁰ *Makwanyane* (1995) para 151.

Constitutional Court by analysing specific extracts of the *Soobramoney* judgment as follows:

‘His life could be prolonged by means of regular renal dialysis...’⁹⁵¹

This case was ultimately concerned with a reasonable expectation (on the part of an unemployed and incapacitated member of a vulnerable group) that the state would come to his aid by protecting him from an imminent threat to his continued survival.

Paragraph 8 (as previously quoted in the opening chapter of this thesis) struck an aspirational tone which (falsely) suggested that the judgment to follow would herald a new dawn in giving effect to the progressive realisation of the right to health care.

Liebenberg believes that paragraph 8 of the *Soobramoney* judgment (as quoted in the opening passages of Chapter 1) is important as it confirms the definitive link between socio-economic rights and the ‘foundational’ constitutional values of human dignity, equality and freedom.⁹⁵² Furthermore, it serves to emphasise that countering the effects of poverty and inequality (as well as transforming our society into one that is defined by human dignity, equality and freedom) is a pivotal constitutional purpose.⁹⁵³ The Constitutional Court refers to ‘... that aspiration will have a hollow ring’⁹⁵⁴ so as to acknowledge that the substantive realisation of socio-economic rights is critical to the success of our constitutional democracy.⁹⁵⁵ Furthermore, this serves to ensure that the aforementioned core constitutional values are keenly felt (as well as embraced) by the whole population.⁹⁵⁶ The aforementioned observations by Liebenberg bolsters my previous assertion as to how a first reading of paragraph 8 of the *Soobramoney* judgment is misleading

⁹⁵¹ *Soobramoney* (1998) para 1.

⁹⁵² Liebenberg S ‘Interpretation of socio-economic rights’ (2003) (Section 33.4) 1.

⁹⁵³ Liebenberg S ‘Interpretation of socio-economic rights’ (2003) (Section 33.4) 1.

⁹⁵⁴ *Soobramoney* (1998) para 8.

⁹⁵⁵ Liebenberg S ‘Interpretation of socio-economic rights’ (2003) (Section 33.4) 1.

⁹⁵⁶ Liebenberg S ‘Interpretation of socio-economic rights’ (2003) (Section 33.4) 1.

(and ultimately disappointing) as it suggests that the rest of the judgment would break new ground in advancing access to healthcare rights.

‘...Improve the quality of life of all citizens and free the potential of each person.’⁹⁵⁷

It is submitted that the Constitutional Court should have ordered the state to fully account for its failure to provide the applicant with the possibility of a life of purpose as provided for in the Preamble.

‘The words “emergency medical treatment” may possibly be open to a broad construction which could include ongoing treatment of chronic illnesses for the purpose of prolonging life. But this is not their ordinary meaning...’⁹⁵⁸

A purposive interpretation of the phrase ‘emergency medical treatment’ would and should be able to accommodate a situation in which a refusal by the state to provide the applicant with medical treatment would lead (without fail) to his death.⁹⁵⁹

‘This court has dealt with the right to life in the context of capital punishment but it has not yet been called upon to decide upon the parameters of the right to life or its relevance to the positive obligations imposed on the state under various provisions of the Bill of Rights...’⁹⁶⁰

It is logical to carefully develop the content of specific rights methodically as required by the circumstances of a specific case. Thus, one could appreciate the reluctance of the Constitutional Court to provide content to the right to life in *Makwanyane* as the primary focus in that case was whether the imposition of the death penalty could be deemed a cruel and unusual punishment.⁹⁶¹ Furthermore, the death penalty was not viewed as a fitting punishment if one had regard for the (suitable) alternative of

⁹⁵⁷ *Soobramoney* (1998) para 9.

⁹⁵⁸ *Soobramoney* (1998) para 13.

⁹⁵⁹ Scott C & Alston P ‘Adjudicating constitutional priorities’ *SAJHR* (2000) 206.

⁹⁶⁰ *Soobramoney* (1998) para 15.

⁹⁶¹ *Makwanyane* (1995) para 341.

life imprisonment.⁹⁶² In this regard Justice O' Regan held that the death penalty in *Makwanyane* breached both the right to life and the right to dignity in the Interim Constitution.⁹⁶³ Justice O'Regan emphasised that the right to life was more than just a formal requirement for giving effect to all other rights as it ultimately served to draw attention to the fact that it was a human life.⁹⁶⁴ Justice O'Regan held that the right to life was of no value without dignity as the right to life encapsulates human dignity.⁹⁶⁵ Thus, it is indeed ironic that Justice O'Regan emphasised the sanctity of 'human life' yet the Court refrained from providing any sort of determinate content to the right to life in *Soobramoney* when that was ultimately the right that had been placed in jeopardy as previously indicated.⁹⁶⁶

It is fair comment that the *Soobramoney* matter may have focussed on the right of access to health care but it ultimately dealt with a life and death situation as the applicant was destined to suffer a painful death in the absence of critical medical treatment. The reality is that the rights entrenched in the Constitution would count for nought in the absence of sustaining the life of the rights-holder. In addition, it is necessary to draw attention to the grave assault on the dignity of Mr Soobramoney (in being refused the required medical treatment) which put an end to any prospects of enjoying a continued life of purpose with his family. In this regard reference should be made to the relevant text to follow regarding the quality of life that is enjoyed by patients receiving renal dialysis treatment.⁹⁶⁷

Furthermore, Brand is correct in highlighting that the Constitutional Court interpreted the right not to be refused emergency treatment in *Soobramoney* in such a manner as to render it virtually obsolete.⁹⁶⁸

⁹⁶² *Makwanyane* (1995) para 128.

⁹⁶³ *Makwanyane* (1995) para 318.

⁹⁶⁴ *Makwanyane* (1995) para 326.

⁹⁶⁵ *Makwanyane* (1995) para 327.

⁹⁶⁶ Cornell D & Muvangua N 'Ubuntu and the law: African ideals and post-apartheid jurisprudence' (2012) 70.

⁹⁶⁷ Please see Section 5.8 as well as Annexure 1.

⁹⁶⁸ Brand D 'What are socio-economic rights for?' (2003) 47.

Firstly, the Constitutional Court defined ‘emergency medical treatment’ as tantamount to attending to a sudden catastrophe which necessitated immediate treatment to stave off serious harm or death.⁹⁶⁹ This effectively excluded the applicant as he suffered from a chronic (yet ultimately fatal) condition. Secondly, the Constitutional Court employed a historical interpretative approach to highlight the manner in which people were denied access to life-saving treatment (on the basis of their race in the apartheid era) and that this provision ultimately sought to put an end to this deplorable practice and nothing more.⁹⁷⁰ Brand rightfully refers to the insights offered by Scott and Alston (discussed below) in that the aforementioned interpretation adopted by the Constitutional Court is rendered redundant as the self-same right (not to be refused access to emergency treatment on the basis of a display of *mala fides* or an irrational decision) already finds expression in section 27(1).⁹⁷¹ Finally, the Constitutional Court elected to avoid providing a substantive standard (in holding that the state is obliged to provide emergency medical services) which could have been supported by the text of the constitutional provision.⁹⁷² Thus, Brand was correct in concluding that the court elected to endorse a ‘structural standard of non-arbitrariness’ rather than seek to define a substantive standard regarding the provision of emergency medical treatment.⁹⁷³

‘In our constitution the right to medical treatment does not have to be inferred from the nature of the state established by the Constitution or from the right to life which it guarantees. It is dealt with directly in section 27...’⁹⁷⁴

It is difficult not to dwell on the words of De Vos⁹⁷⁵ (about the need for the Constitutional Court to demonstrate courage in giving effect to socio-

⁹⁶⁹ *Soobramoney* (1998) para 20.

⁹⁷⁰ *Soobramoney* (1998) para 17.

⁹⁷¹ Brand D ‘What are socio-economic rights for?’ (2003) 47.

⁹⁷² Brand D ‘What are socio-economic rights for?’ (2003) 47.

⁹⁷³ Brand D ‘What are socio-economic rights for?’ (2003) 47.

⁹⁷⁴ *Soobramoney* (1998) para 19.

⁹⁷⁵ De Vos P ‘Pious wishes’ *SAJHR* (1997) 67.

economic rights) as this passage of the judgment sought to deflect attention away from the primary issue in dispute (i.e. the right to life).

‘The applicant suffers from chronic renal failure. To be kept alive by dialysis he would require such treatment two to three times a week...It is an ongoing state of affairs resulting from a deterioration of the applicant’s renal function which is incurable...’⁹⁷⁶

It is of critical importance to note that the medical condition of the applicant was indeed incurable yet treatable. This consequently represents an exceptionally low accountability standard to demand of the state in advancing the core constitutional entitlements of vulnerable groups (in the absence of detailed information about the scarcity of state resources).

‘At present the Department of Health in KwaZulu-Natal does not have sufficient funds to cover the cost of the services which are being provided to the public. In 1996-1997 it overspent its budget by R152 million, and in the current year it is anticipated that the overspending will be R700 million unless a serious cutback is made in the services which it provides. The renal unit at the Addington Hospital has to serve the whole of Kwa-Zulu Natal and also takes patients from parts of the Eastern Cape...Guidelines have therefore been established to assist the persons working in these clinics to make the agonising choices which have to be made in deciding who should receive treatment, and who not. These guidelines were applied in the present case.’⁹⁷⁷

In this regard Justice O’Regan believes that a fourth level of obligation can be identified in that a right may place an obligation upon the state to act rationally and in good faith and insist that the state justify its failure

⁹⁷⁶ *Soobramoney* (1998) para 21.

⁹⁷⁷ *Soobramoney* (1998) para 21.

to discharge an obligation.⁹⁷⁸ Thus, there must be 'a good reason for the State not to respect, protect, promote and fulfil a right'.⁹⁷⁹ Justice O' Regan subsequently referred with approval to *Soobramoney* in which it was held that the state had a duty to demonstrate that it acted rationally and in good faith under the circumstances.⁹⁸⁰ This in turn required the state to meet an evidentiary burden in placing evidence before the Constitutional Court (including the policy regarding the rationing of limited renal dialysis equipment as well as the applicable budget).⁹⁸¹ However, it is submitted that the Constitutional Court failed to insist upon the appropriate level of accountability to be assumed by the state regarding the progressive realisation of health-care rights.

De Vos notes that the qualification 'within its available resources' highlights the robustness of the economy of a state which essentially determines the level and extent of its obligations with respect to the realisation of human rights.⁹⁸² However, the aforementioned qualification does not imply that unwavering deference should be displayed towards the state in its determination of what qualifies as a suitable allocation of resources.⁹⁸³ De Vos rightfully believes that to do so would be to defeat the purpose of the state having to account for duties owed to its people in realising human rights.⁹⁸⁴ Also, the Constitutional Court should not display deference to the other branches of government to the extent that it would negate the duty of the state to realise critical socio-economic rights as enshrined in the Constitution.⁹⁸⁵

Consequently, it is apparent that the Constitutional Court should not have confined itself to deliberations involving a provincial health budget as this was far removed from a reasonable interpretation of the 'available

⁹⁷⁸ O' Regan K 'Introducing Socio-Economic Rights' (1999) 1 *ESR Review*.

⁹⁷⁹ O' Regan K 'Introducing Socio-Economic Rights' (1999) 1 *ESR Review*.

⁹⁸⁰ O' Regan K 'Introducing Socio-Economic Rights' (1999) 1 *ESR Review*.

⁹⁸¹ O' Regan K 'Introducing Socio-Economic Rights' (1999) 1 *ESR Review*.

⁹⁸² De Vos P 'Pious wishes' *SAJHR* (1997) 92.

⁹⁸³ De Vos P 'Pious wishes' *SAJHR* (1997) 92.

⁹⁸⁴ De Vos P 'Pious wishes' *SAJHR* (1997) 92.

⁹⁸⁵ De Vos P 'Pious wishes' *SAJHR* (1997) 92.

resources' of the state.⁹⁸⁶ However, Liebenberg believed that it was perhaps not possible to consider the role of the national government as the only respondent cited was the provincial Minister of Health (and national government was consequently not a party to the proceedings).⁹⁸⁷ It should be noted that the policy guidelines utilised by the state hospital suggested that a fair procedure had been followed but this unravels when one seeks to find the substantive fairness of deciding who lives or dies on the basis of an innocuous checklist. However, what is of more concern is that the state was not called upon to account for how it was going to remedy the situation (in relation to meeting the needs of patients requiring renal-dialysis treatment and/or the progressive realisation of the right of access to healthcare) in the immediate future/foreseeable future. In this regard reference should be made to the insightful contribution by Fabian regarding the present-day availability of renal-dialysis treatment in South Africa.⁹⁸⁸

'...The nurse-patient ratio in the renal unit is 1:4.5 instead of the recommended ratio of 1:2.5'.⁹⁸⁹

The Constitutional Court should have instructed the state to account for how it was planning to remedy the human resources deficit in the shortest possible time – this would have served as an able demonstration of the accountability of the state in relation to advancing a critical element in the progressive realisation of the right of access to healthcare. In this regard Robertson provides illuminating insights as to how an objective standard can be utilised to assess the performance of the state in giving effect to critical socio-economic rights.⁹⁹⁰ It should be noted that human resources can be analysed by quantifying both the number of people which work in a specific region as well as their

⁹⁸⁶ Liebenberg S 'Interpretation of socio-economic rights' (2003) (Section 33.5) 14.

⁹⁸⁷ Liebenberg S 'Interpretation of socio-economic rights' (2003) (Section 33.5) 14.

⁹⁸⁸ Please see Section 3.6.2.2.

⁹⁸⁹ *Soobramoney* (1998) para 26.

⁹⁹⁰ Robertson R 'Measuring state compliance' (1994) 16 *Human Rights Quarterly* 693.

demonstrated competence level.⁹⁹¹ A fitting example is cited in public healthcare where the amount of doctors and nurses required to adequately meet the needs of the population can be calculated.⁹⁹² Consequently, the level of compliance with the resource obligation can be determined by following a proven process for ascertaining the required manpower and the actual deployment of that manpower.⁹⁹³

‘There are also those who need access to housing, food and water, employment opportunities, and social security. These too are aspects of the right to...human life: the right to live as a human being, to be part of a broader community, to share in the experience of humanity. The state has to manage its limited resources in order to address all these claims. There will be times when this requires it to adopt a holistic approach to the larger needs of society rather than to focus on the specific needs of particular individuals within society.’⁹⁹⁴

This extract highlights the need for the Constitutional Court to adopt the minimum core approach (as proposed by Bilchitz) so as to provide determinate content to socio-economic rights and prioritise the realisation of the aforementioned rights as a means to ease the plight of vulnerable groups. Also, the state should be obliged by the Constitutional Court to account for the manner in which it will give effect to urgent socio-economic rights in the shortest possible time.

‘...Some rights in the Constitution are the ideal and something to be strived for. They amount to a promise, in some cases, and an indication of what a democratic society aiming to salvage lost dignity, freedom and equality

⁹⁹¹ Robertson R ‘Measuring state compliance’ (1994) 16 *Human Rights Quarterly* 693.

⁹⁹² Robertson R ‘Measuring state compliance’ (1994) 16 *Human Rights Quarterly* 693.

⁹⁹³ Robertson R ‘Measuring state compliance’ (1994) 16 *Human Rights Quarterly* 693.

⁹⁹⁴ *Soobramoney* (1998) para 31.

should embark upon. They are values which the Constitution seeks to provide, nurture and protect for a future South Africa.⁹⁹⁵

It is fair comment that the Court lost sight of the distinction between rights and policy with reference to the aforementioned passage.⁹⁹⁶ Moellendorf believes that the Court, with reference to the abovementioned quote by Madala J, has in fact cast aside the primary justification for the inclusion of socio-economic rights in the Constitution in so far as the safeguarding of socio-economic rights is necessary to ensure that citizens 'can act in ways protected by other rights'.⁹⁹⁷

Furthermore, the difficulty in utilising the phrase 'for a future South Africa' is that the state has not been called to account as to its benchmarked targets (in respect of the realisation of socio-economic rights) in the present time nor in the foreseeable future. Thus, it serves to make a mockery of the 'progressive realisation' of critical subsistence rights. A case in point is the present-day consequences of the Constitutional Court not holding the state to account regarding access to renal dialysis treatment in *Soobramoney* in 1997.⁹⁹⁸ Thus, there is a clear need for detailed benchmarking on the part of the state (in giving effect to the realisation of socio-economic rights) so as to ensure that the state cannot practice 'sleight of hand'⁹⁹⁹ in highlighting that additional resources cannot be allocated to meet specific healthcare needs because it has to contend with so many other urgent priorities. However, the state fails to provide any compelling proof that the allocated funds are in fact utilised to deal with those 'other' urgent priorities as outlined by the state.

'The fundamental issue is whether this Constitutional Court, as the guardian of the Constitution, as the protector of human rights and the upholder of democracy, should in

⁹⁹⁵ *Soobramoney* (1998) para 42.

⁹⁹⁶ Moellendorf D 'Reasoning about resources' *SAJHR* (1998) 331.

⁹⁹⁷ Moellendorf D 'Reasoning about resources' *SAJHR* (1998) 331.

⁹⁹⁸ Please see Section 3.6.2.2.

⁹⁹⁹ Praeg L *Report on Ubuntu* (2014) 13.

this case require a health authority, acting through its authorised medical practitioner, to adopt a course of treatment which in the bona fide clinical and incisive judgment of the practitioner will not cure the patient but merely prolong his life for some time...'¹⁰⁰⁰

The Constitutional Court failed to recognise and/or acknowledge the manner in which Mr. Soobramoney had been dehumanised in being refused urgent medical treatment on the basis of a checklist. Mr. Soobramoney was not just a renal dialysis patient but rather a human being with a family that cared for him. Furthermore, the additional quality time that he could have spent with them (while receiving dialysis treatment) could have been viewed as pursuing a life of purpose as well as providing him with an opportunity to come to terms with his mortality as per the insights offered by Justice Sachs.¹⁰⁰¹ In this regard reference should also be made to the text to follow in relation to 'quality of life'¹⁰⁰² as well as a newspaper report concerning the Soobramoney family.¹⁰⁰³

A defining feature of *Soobramoney* is the specific institutional role assumed by Dr. Naicker, in being the attending renal physician (as well as the President of the Renal Society at the time), who was in fact tasked to give effect to priority-setting (on a daily basis) in the relevant clinical setting at Addington Hospital.¹⁰⁰⁴ Thus, the presumptive deference owed to such an institutional actor is considerable (and ultimately confirmed in this case) as she was able to satisfy the Constitutional Court as to the maximum utilisation of scarce resources so as to benefit the maximum number of patients in a consistent and transparent manner.¹⁰⁰⁵

'Perhaps a solution might be to embark upon a massive education campaign to inform the citizens generally about

¹⁰⁰⁰ *Soobramoney* (1998) para 45.

¹⁰⁰¹ Please see *Soobramoney* (1998) para 57 below.

¹⁰⁰² Please see Section 5.8 and Annexure 1.

¹⁰⁰³ Please see Section 5.8.1.

¹⁰⁰⁴ Scott C & Alston P 'Adjudicating constitutional priorities' *SAJHR* (2000) 236.

¹⁰⁰⁵ Scott C & Alston P 'Adjudicating constitutional priorities' *SAJHR* (2000) 236.

the causes of renal failure...to prolong their life expectancy.’¹⁰⁰⁶

This is an excellent idea on the part of Justice Madala in highlighting the duty of the state to give effect to the dissemination of critical information to the public. However, the plight of the current crop of patients that require renal dialysis treatment should be addressed as a matter of urgency.

‘In a case such as the present which engages our compassion to the full, I feel it necessary to underline the fact that Chaskalson P’s judgment, as I understand it, does not “merely toll the bell of lack of resources”. In all the open and democratic societies based upon dignity, freedom and equality with which I am familiar, the rationing of access to life-prolonging resources is regarded as integral to, rather than incompatible with, a human rights approach to health care.’¹⁰⁰⁷

It is submitted that the Constitutional Court did in fact ‘merely toll the bell of resources’ as the state was never pushed to adduce compelling evidence of its supposedly depleted resources (nor sectoral plans that had been suitably benchmarked) to facilitate progressive realisation of socio-economic rights. It is difficult to embrace the abovementioned reasoning of Justice Sachs regarding the ‘rationing’ of access as this would suggest that the state had in fact properly accounted for all of its available resources. This would in turn imply that the state had sought to advance urgent socio-economic rights despite its scarce resources (as per the broad interpretation endorsed by international law which would certainly not be confined to a provincial health budget) and had come up short in giving immediate effect to the most pressing subsistence rights. Thus, the state would have no alternative but to undertake rationing measures. Furthermore, the state would be required to clearly articulate how it planned to reduce rationing measures (or even

¹⁰⁰⁶ *Soobramoney* (1998) para 49.

¹⁰⁰⁷ *Soobramoney* (1998) para 52.

cast aside those same rationing measures) in the time to come as a demonstration of its accountability in eradicating the deprivation endured by vulnerable groups.

‘However the right to life may come to be defined in South Africa, there is in reality no meaningful way in which it can constitutionally be extended to encompass the right indefinitely to evade death...We can, however, influence the manner in which we come to terms with our mortality...’¹⁰⁰⁸

The Constitutional Court should have maintained a clear and persistent focus on the realisation of urgent subsistence rights rather than undertaking a philosophical exploration of the manner in which one could come to terms with one’s impending death. It is submitted that the Court erred in not providing content to the right to life. It is further submitted that the aforementioned stance assumed by the Court, in effect, condoned the failure of the state to adequately account for its inability to realise critical subsistence rights of vulnerable groups in the shortest possible time/foreseeable future.

‘...Important though our review functions are, there are areas where institutional capacity and appropriate constitutional modesty require us to be especially cautious...’¹⁰⁰⁹

The persuasive insight attributed to De Vos (regarding the courage required by the Constitutional Court to give effect to socio-economic rights) should be contrasted with the illuminating contribution by Roux regarding the Separation of Powers Doctrine.¹⁰¹⁰

‘...If resources were co-extensive with compassion, I have no doubt as to what my decision would have been...’¹⁰¹¹

¹⁰⁰⁸ *Soobramoney* (1998) para 57.

¹⁰⁰⁹ *Soobramoney* (1998) para 58.

¹⁰¹⁰ Please see Section 3.6.5.1.

¹⁰¹¹ *Soobramoney* (1998) para 59.

The abovementioned words, as offered by the Constitutional Court, would in all likelihood have been of little comfort to Mr. Soobramoney and his family as he was effectively sent home to die. In this regard Mr. Soobramoney did in fact pass away just two days after the decision was handed down by the Constitutional Court (as previously described).

Cameron believes that the decision rendered by the court (at the time) to be correct as Mr Soobramoney had elected to challenge a health policy that restricted renal dialysis to those patients that were likely to be successfully treated.¹⁰¹² He believed that the court could not take the view that the government had failed to take reasonable steps to realise Mr. Soobramoney's right of access to health care.¹⁰¹³ Neither could it be said that the distributional policy utilised by the relevant health personnel (to allocate dialysis treatment to those patients that had prospects of making a full recovery) was incorrect.¹⁰¹⁴ Consequently, Cameron believed that the court's decision was 'agonising, but clear'.¹⁰¹⁵ However, the *Soobramoney* decision was criticised in part because the underlying values-based rationale employed by the Constitutional Court in the *Makwanyane* matter (in which the court had to consider the constitutionality of the death penalty as previously detailed) was in stark contrast with the rationale employed in the *Soobramoney* matter. That is, if one considers (as previously indicated) that the Court deemed the death penalty to be devoid of ubuntu yet the same Court condoned the refusal of renal dialysis treatment which effectively sentenced Mr. Soobramoney to death.

It should be noted that the analysis of *Soobramoney* as well as *Grootboom* (as confined to the High Court decision) by Scott and Alston is of considerable academic interest as it is presented against the backdrop of exploring the ties between the Bill of Rights in the South African Constitution and international human rights law (as well as

¹⁰¹² Cameron E *Justice: a personal account* (2014) 254.

¹⁰¹³ Cameron E *Justice: a personal account* (2014) 256.

¹⁰¹⁴ Cameron E *Justice: a personal account* (2014) 256.

¹⁰¹⁵ Cameron E *Justice: a personal account* (2014) 256.

foreign constitutional law).¹⁰¹⁶ Scott and Alston offer a detailed analysis of *Soobramoney* as a means to emphasise that the aforementioned judgment should only serve as ‘the first tentative step’ in shaping a positive relationship between the judiciary and legislature in South Africa ‘as well as between the Constitution and its international analogues’.¹⁰¹⁷ The authors are critical of the lack of discussion of international human rights law (with specific reference to positive rights in an environment of scarce resources) as well as ‘the urgency with which arguments were heard and digested’ in *Soobramoney*.¹⁰¹⁸ It is for this reason that the authors sought to pin their hopes on the impending (at the time) appeal of the *Grootboom* matter to the Constitutional Court as a gilt-edged opportunity to undertake a proper engagement with international human rights law pertaining to socio-economic rights.¹⁰¹⁹

The Constitutional Court had subsequently referred to the manner in which interests that are connected to life (e.g. health) form part of the right to life.¹⁰²⁰ However, the Constitutional Court ‘seemed to engage in a *volte-face*’ by failing to interpret the relevance of section 11 to the positive obligations borne by the state under the different provisions in the Bill of Rights (including section 27).¹⁰²¹ The Constitutional Court refers with approval¹⁰²² to an Indian Supreme Court constitutional case, *Paschim Banga Khet Mazdoor Samity and Others v State of West Bengal and Another* (‘*Samity*’), in which the Indian court held that the state had violated the right to life by failing to provide ‘timely medical treatment’ to a person that required such treatment.¹⁰²³ However, this is despite the fact that the Constitutional Court had elected to avoid a

¹⁰¹⁶ Scott C & Alston P ‘Adjudicating constitutional priorities’ *SAJHR* (2000) 206.

¹⁰¹⁷ Scott C & Alston P ‘Adjudicating constitutional priorities’ *SAJHR* (2000) 208.

¹⁰¹⁸ Scott C & Alston P ‘Adjudicating constitutional priorities’ *SAJHR* (2000) 208.

¹⁰¹⁹ Scott C & Alston P ‘Adjudicating constitutional priorities’ *SAJHR* (2000) 208.

¹⁰²⁰ Scott C & Alston P ‘Adjudicating constitutional priorities’ *SAJHR* (2000) 236.

¹⁰²¹ Scott C & Alston P ‘Adjudicating constitutional priorities’ *SAJHR* (2000) 236.

¹⁰²² *Soobramoney* (1998) para 18.

¹⁰²³ *Paschim Banga Khet Mazdoor Samity and Others v State of West Bengal and Another* (1996) AIR SC 2426 (hereafter *Samity*).

nuanced discussion of the right to life (as enshrined in section 11) in *Soobramoney*.¹⁰²⁴

Mr Hakim Seikh, a member of *Paschim Banga Khet Mazdoor Samity*, which was an organisation of agricultural workers, had been seriously injured in a train accident.¹⁰²⁵ However, Mr Seikh had been turned away from a number of public hospitals and ultimately ended up being treated in a private hospital.¹⁰²⁶ The *Samity* case was viewed as an instance where emergency treatment ‘was available but denied’.¹⁰²⁷ In this regard the Constitutional Court is perceived as invoking *Samity* as accurately representing the nature of the state action which the Constitutional Court would likely be willing to deem a violation of section 27(3).¹⁰²⁸ Thus, the finding of the Constitutional Court could be read as ‘no one may be refused available emergency medical treatment from existing facilities’.¹⁰²⁹ Consequently, section 27(3) is deemed to only confer negative duties on the state and it should be interpreted to only encompass ‘state exclusion from existing and available resources’.¹⁰³⁰

The Constitutional Court is viewed as being hasty in seeking to draw support¹⁰³¹ from the abovementioned *Samity* case as the arbitrary exclusion of Mr. Seikh from state health facilities was in fact just one aspect of the case.¹⁰³² In addition, the *Samity* judgment had a distinct focus on the ‘inadequacy of the emergency care network’ in the whole city as well as the critical shortage of resources even at those hospitals which had declined to treat Mr. Seikh.¹⁰³³ Thus, the Indian Supreme Court issued remedial orders in terms of which the state had to embrace a number of positive obligations.¹⁰³⁴ Furthermore, the state was ordered

¹⁰²⁴ *Soobramoney* (1998) para 19.

¹⁰²⁵ *Samity* (1996) AIR SC 2429.

¹⁰²⁶ *Samity* (1996) AIR SC 2429.

¹⁰²⁷ Scott C & Alston P ‘Adjudicating constitutional priorities’ *SAJHR* (2000) 237.

¹⁰²⁸ Scott C & Alston P ‘Adjudicating constitutional priorities’ *SAJHR* (2000) 237.

¹⁰²⁹ Scott C & Alston P ‘Adjudicating constitutional priorities’ *SAJHR* (2000) 237.

¹⁰³⁰ Scott C & Alston P ‘Adjudicating constitutional priorities’ *SAJHR* (2000) 245.

¹⁰³¹ *Soobramoney* (1998) para 18.

¹⁰³² Scott C & Alston P ‘Adjudicating constitutional priorities’ *SAJHR* (2000) 245.

¹⁰³³ Scott C & Alston P ‘Adjudicating constitutional priorities’ *SAJHR* (2000) 245.

¹⁰³⁴ *Samity* (1996) AIR SC 2429 para 9.

to settle the medical expenses incurred by Mr. Seikh at the private hospital and he was also awarded a further sum of money 'having regard to the facts and circumstances'.¹⁰³⁵ Finally, it should be emphasised that more than half the written length of the judgment specifically focussed on 'the remedial measures to rule out the recurrence of such incidents in future and to ensure immediate medical attention and treatment to persons in real need'.¹⁰³⁶ This serves to highlight that the choice exercised by the Constitutional Court (in referring to *Samity*) is indeed perplexing in light of the judgment that was ultimately handed down in *Soobramoney*.

Scott and Alston refer to General Comment 3 which provides in part that:

'...The Committee is of the view that a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every State party. Thus, for example, a State party (to the Covenant) in which any significant number of individuals is deprived of essential foodstuffs, of essential primary health care or basic shelter and housing, or the most basic form of education is prima facie failing to discharge its obligations under the Covenant'.¹⁰³⁷

It follows that every state should at least provide a core universal minimum as detailed in the abovementioned extract of General Comment 3.¹⁰³⁸ Thus, it is indeed surprising that the concept of minimum essential levels was not discussed in *Soobramoney* (let alone deemed to have been met) in light of the nature of the health interests at stake and its centrality in giving effect to life itself.¹⁰³⁹ The Constitutional Court could rightfully be viewed as approaching the specific issue in an 'all or

¹⁰³⁵ *Samity* (1996) AIR SC 2429 para 9.

¹⁰³⁶ *Samity* (1996) AIR SC 2429 para 10.

¹⁰³⁷ General Comment No. 3: <http://www.refworld.org/docid/4538838e10.html>, (accessed 1 August 2016).

¹⁰³⁸ Scott C & Alston P 'Adjudicating constitutional priorities' *SAJHR* (2000) 250.

¹⁰³⁹ Scott C & Alston P 'Adjudicating constitutional priorities' *SAJHR* (2000) 251.

nothing way'.¹⁰⁴⁰ Thus, one either enjoyed the protection of section 27(3) in being provided with (available) emergency health services or one is found to be 'entirely outside any constitutional imperative' despite the fact that Mr Soobramoney's life was in jeopardy in exactly the same way as an accident victim.¹⁰⁴¹

Scott and Alston believe that the Constitutional Court would (likely) have been on solid ground in finding that providing life-prolonging renal dialysis treatment could not reasonably be viewed as forming part of the minimum core obligation in South Africa (in 1997).¹⁰⁴² In this regard it should be noted that a final determination (as to whether renal dialysis fell outside the ambit of the minimum core obligation) could only be made if the state had been ordered by the Constitutional Court to fully account as to its available resources. It is unfortunate that the Constitutional Court elected not to engage in this analysis and instead resorted to hiding behind the fact that 'setting constitutional priorities would have allocation-of-resource impacts'.¹⁰⁴³ However, the Constitutional Court missed the point entirely (when it deemed the setting of priorities to be the specific challenge) as the thrust of giving effect to constitutional rights is to set those same priorities for the state.¹⁰⁴⁴

I concur with Scott and Alston that positive rights and the minimum core obligation do in fact have a 'significant prioritising function'.¹⁰⁴⁵ Furthermore, the perspective of the Constitutional Court, that the progressive realisation of the rights to health for 'everyone' would be undermined by being delayed if the needs of Mr. Soobramoney and everyone in his position was prioritised,¹⁰⁴⁶ is difficult to accept in the circumstances.¹⁰⁴⁷ This is due to the fact that the Constitutional Court

¹⁰⁴⁰ Scott C & Alston P 'Adjudicating constitutional priorities' *SAJHR* (2000) 251.

¹⁰⁴¹ Scott C & Alston P 'Adjudicating constitutional priorities' *SAJHR* (2000) 251.

¹⁰⁴² Scott C & Alston P 'Adjudicating constitutional priorities' *SAJHR* (2000) 252.

¹⁰⁴³ *Soobramoney* (1998) para 31.

¹⁰⁴⁴ Scott C & Alston P 'Adjudicating constitutional priorities' *SAJHR* (2000) 252.

¹⁰⁴⁵ Scott C & Alston P 'Adjudicating constitutional priorities' *SAJHR* (2000) 252.

¹⁰⁴⁶ *Soobramoney* (1998) para 31.

¹⁰⁴⁷ Scott C & Alston P 'Adjudicating constitutional priorities' *SAJHR* (2000) 252.

‘was in effect treating the claim to treatment for urgent life-threatening conditions as having no more call upon society than any other health care claim’.¹⁰⁴⁸

The *Soobramoney* judgment was criticised for the ‘the thinness of its analysis’ but there is (seemingly) general agreement as to the finding of the Constitutional Court that there was no universal right to renal dialysis treatment under present conditions.¹⁰⁴⁹ However, the need for the state to adequately account as to its available resources (before judgment can be passed as to what can be accommodated in terms of specific treatment offerings) remains a pressing concern. Cornell believed that our humanity as a people was lessened at the time of the passing of Mr Soobramoney.¹⁰⁵⁰ However, it is my view that our humanity as a people was lessened at an earlier point in time when the collective failure, on the part of relevant public officials and state institutions to find a way to save the life of Mr Soobramoney, became apparent. Nonetheless, a timely intervention by big business and/or wealthy South Africans and/or ordinary communities so as to assist Mr Soobramoney and his family (and in so doing give effect to the communal obligations’ focus of ubuntu in creating a just and caring society in which all people are treated as having equal worth) would have been a powerful revelation. In addition, this would have served as an illuminating display of our shared humanity while showcasing the failure of the state to come to the aid of a member of a vulnerable group.

It is of crucial importance to highlight that the communal obligations’ focus of ubuntu is epitomised by public officials that demonstrate an unyielding focus on giving effect to the socio-economic rights as enshrined in the Constitution. It is submitted that the aforementioned ‘unyielding focus’ on the part of public officials is an express acknowledgement of the accountability of those officials to come to the aid of vulnerable groups. Furthermore, it serves to highlight the definitive

¹⁰⁴⁸ Scott C & Alston P ‘Adjudicating constitutional priorities’ *SAJHR* (2000) 252.

¹⁰⁴⁹ Liebenberg S ‘Interpretation of socio-economic rights’ (2003) (Section 33.5) 8.

¹⁰⁵⁰ Cornell D ‘A Call for a Nuanced Constitutional Jurisprudence’ (2012) 331.

link between ubuntu and the accountability of public officials in forging a nation-state in which our shared humanity (evidenced by continuous harmonising acts as per the insights of Praeg) is the most prominent feature.

3.6.2.1 The appropriate allocation and subsequent utilisation of scarce resources by the state

The *Soobramoney* decision requires specific scrutiny as the verdict rendered by the Constitutional Court was premised almost entirely on the scarcity of resources.¹⁰⁵¹ In this regard it should be noted that resource constraints is one of the pivotal factors in determining the unconditional obligations to be borne by the state regarding socio-economic rights.¹⁰⁵² Nonetheless, it is critical that public officials should make every possible effort to come to the aid of vulnerable groups (that find themselves in perilous circumstances) so as to be viewed as discharging their obligations to give effect to constitutionally guaranteed rights. Furthermore, it is only when (diligent) public officials have discharged their obligations (as per the Constitution) that one can speak of public officials as having embraced the spirit of ubuntu in giving effect to communal obligations.

The Constitutional Court in *Soobramoney* contemplated the claim in terms of section 27(1) and 27(2) within the confines of the budget of the provincial Department of Health in Kwa-Zulu Natal.¹⁰⁵³ It should be noted that the Court at no time expressed its willingness to examine the budgetary allocation of health resources from the national sphere of government to the provincial sphere.¹⁰⁵⁴ The Court is viewed as applying a 'very deferential standard of review' in respect of the political and medical decisions under consideration in this case.¹⁰⁵⁵ However, it is correctly pointed out that (the realisation of) socio-economic rights could

¹⁰⁵¹ Bilchitz D *Poverty and Fundamental Rights* (2007) 225.

¹⁰⁵² Bilchitz D *Poverty and Fundamental Rights* (2007) 225.

¹⁰⁵³ Liebenberg S 'Interpretation of socio-economic rights' (2003) (Section 33.5) 14.

¹⁰⁵⁴ Liebenberg S 'Interpretation of socio-economic rights' (2003) (Section 33.5) 14.

¹⁰⁵⁵ Liebenberg S 'Interpretation of socio-economic rights' (2003) (Section 33.5) 14.

offer no definitive guide to developing policy 'if the scope of the rights in sections 26 and 27 are determined by the State's pre-existing budgetary choices'.¹⁰⁵⁶ Thus, it is indeed necessary to utilise a broader definition of 'available resources' if the ultimate goal of realising socio-economic rights is to guide policy rather than be dependent on it.¹⁰⁵⁷

A concern is noted in that the Constitutional Court has not adopted a definitive approach with regards to the affirmation of a right (and its content) even though the right in question was not capable of being realised at present.¹⁰⁵⁸ This is consistent with an approach that recognises that resource constraints in no way tamper with an individual having a conditional right but ultimately affects the inherent ability to realise that right.¹⁰⁵⁹ However, this inability to realise the right is fittingly portrayed as a moral tragedy in that vulnerable people will be excluded from accessing shelter, food, water and critical (life-saving) health care.¹⁰⁶⁰ The reality is that resource constraints should feature in shaping the content of unconditional obligations rather than in determining the content of conditional obligations.¹⁰⁶¹ Consequently, the (present) unconditional obligations of the state should have due consideration for scarcity and other relevant factors.¹⁰⁶² It follows that the obligations of the state will increase if scarcity levels (of relevant resources) are reduced.¹⁰⁶³

Bilchitz notes that the fulfilment of obligations in certain instances (with specific reference to the right to health care) appears to be permanently out of reach.¹⁰⁶⁴ Consequently, the usefulness in identifying the minimum core obligation is questioned in those circumstances where it

¹⁰⁵⁶ Liebenberg S 'Interpretation of socio-economic rights' (2003) (Section 33.5) 14.

¹⁰⁵⁷ Liebenberg S 'Interpretation of socio-economic rights' (2003) (Section 33.5) 14.

¹⁰⁵⁸ Bilchitz D *Poverty and Fundamental Rights* (2007) 217. Please see *Soobramoney* (1998) paras 11 and 54.

¹⁰⁵⁹ Bilchitz D *Poverty and Fundamental Rights* (2007) 217.

¹⁰⁶⁰ Bilchitz D *Poverty and Fundamental Rights* (2007) 217.

¹⁰⁶¹ Bilchitz D *Poverty and Fundamental Rights* (2007) 218. Please see *Grootboom* (2000) para 46.

¹⁰⁶² Bilchitz D *Poverty and Fundamental Rights* (2007) 218.

¹⁰⁶³ Bilchitz D *Poverty and Fundamental Rights* (2007) 218.

¹⁰⁶⁴ Bilchitz D *Poverty and Fundamental Rights* (2007) 220.

is deemed impossible to attain.¹⁰⁶⁵ However, it is my firm view that Bilchitz should guard against making the same mistake (which he had criticised the Constitutional Court for) by making the case for the state in relation to the scarcity of state resources without the state providing persuasive proof to that effect. Thus, the state should demonstrate its unerring political will in striving for the betterment of society by giving effect to healthcare rights (in terms of benchmarked sectoral targets) as part of the obligations owed to specific vulnerable groups.

The Constitutional Court held in *Soobramoney* (as previously quoted) that:

‘...If this principle were to be applied to all patients claiming access to expensive medical treatment or expensive drugs, the health budget would have to be dramatically increased to the prejudice of other needs which the state has to meet.’¹⁰⁶⁶

However, it is submitted that the expectation is not for the state to do everything at once but rather to demonstrate its determination in progressively realising urgent socio-economic rights in terms of benchmarked targets as shaped by the outer limits of its available resources.

Chaskalson P is viewed as employing the narrowest definition of the term ‘scarcity of resources’ in *Soobramoney* by confining his discussion to the provincial health budget¹⁰⁶⁷ in terms of which funds had been made available for renal dialysis as previously described.¹⁰⁶⁸ However, this is at odds with the earlier ruling in the Final Certification case in which the Constitutional Court had to contend with the objection to include socio-economic rights in the Constitution on the basis that it

¹⁰⁶⁵ Bilchitz D *Poverty and Fundamental Rights* (2007) 220.

¹⁰⁶⁶ *Soobramoney* (1998) para 28.

¹⁰⁶⁷ *Soobramoney* (1998) para 28.

¹⁰⁶⁸ Bilchitz D *Poverty and Fundamental Rights* (2007) 225.

would lead to the judiciary dictating budgetary allocations.¹⁰⁶⁹ Furthermore, there are two critical issues to be considered in the adjudication of socio-economic rights as related to the minimum core obligation philosophy.¹⁰⁷⁰ The first (issue) being the pool of resources that can be viewed as being available for giving effect to socio-economic rights and, secondly is the manner in which these identified resources are to be allocated.¹⁰⁷¹

Moellendorf has noted that the term 'available resources' is ambiguous in that:

'It may mean those resources that a ministry or department has been allotted and has budgeted for the protection of the right. Alternatively, it may mean any resources that the state can marshal to protect the right'.¹⁰⁷²

It should be noted that these two versions can be viewed as polar opposites and that the meaning of 'available resources' is to be found somewhere between these two versions.¹⁰⁷³ Furthermore, the Constitutional Court should not restrict its role in deliberating on rights claims to the rigid framework of existing budget allocations.¹⁰⁷⁴ In this regard Moellendorf notes that: 'Rather the court may pass judgment on these rights, as with other rights, that require a change in fiscal priority'.¹⁰⁷⁵ Furthermore, it should be noted that viewing 'available resources' in the narrowest possible terms would be tantamount to dismissing the considerable weight that is to be attached to (critical) rights.¹⁰⁷⁶

¹⁰⁶⁹ Bilchitz D *Poverty and Fundamental Rights* (2007) 225. Please see *In Re: Certification of the Constitution of South Africa* (1996) para 77.

¹⁰⁷⁰ Bilchitz D *Poverty and Fundamental Rights* (2007) 225.

¹⁰⁷¹ Bilchitz D *Poverty and Fundamental Rights* (2007) 225.

¹⁰⁷² Moellendorf D 'Reasoning about resources' *SAJHR* (1998) 330.

¹⁰⁷³ Moellendorf D 'Reasoning about resources' *SAJHR* (1998) 330.

¹⁰⁷⁴ Moellendorf D 'Reasoning about resources' *SAJHR* (1998) 331.

¹⁰⁷⁵ Moellendorf D 'Reasoning about resources' *SAJHR* (1998) 331.

¹⁰⁷⁶ Moellendorf D 'Reasoning about resources' *SAJHR* (1998) 331.

It follows that there is a specific need to guard against the state not fulfilling certain rights through set allocations in the budget.¹⁰⁷⁷ Also, it is necessary to draw a distinction between budgetary allocations that are carefully considered as compared to allocations that have not properly appreciated the critical urgency of the rights.¹⁰⁷⁸ In addition, allocations that are brought about by the mismanagement of resources should be carefully analysed.¹⁰⁷⁹ Furthermore, there is a definitive need for state budgets to be justified by way of cogent reasoning in the event that they are not able to fulfil relevant conditional rights.¹⁰⁸⁰ Thus, the state should be expected to account for its allocation of budgets with reference to all of its 'available resources' with the latter term being defined as 'all those (resources) that lie within the control of the state'.¹⁰⁸¹

It should be noted that 'available resources' at the very least encapsulates all those resources owned by the state and can be included to form part of the budget so as to give effect to a purposive approach in interpreting the obligations that flow from socio-economic rights.¹⁰⁸² Furthermore, it is suggested that capital from foreign loans can ostensibly be included under resources available to the state.¹⁰⁸³ The reality is that the executive (rather than the courts) is best placed to assess the extent of the foreign capital that can be acquired to give effect to socio-economic rights.¹⁰⁸⁴ The role of the Constitutional Court (in this specific instance) would be to advise the state to consider foreign assistance in realising socio-economic rights and subsequently ensure that the state provides sound justification for their decisions relating to foreign aid.¹⁰⁸⁵

¹⁰⁷⁷ Bilchitz D *Poverty and Fundamental Rights* (2007) 228.

¹⁰⁷⁸ Bilchitz D *Poverty and Fundamental Rights* (2007) 228.

¹⁰⁷⁹ Bilchitz D *Poverty and Fundamental Rights* (2007) 228.

¹⁰⁸⁰ Bilchitz D *Poverty and Fundamental Rights* (2007) 228.

¹⁰⁸¹ Bilchitz D *Poverty and Fundamental Rights* (2007) 228.

Please see Moellendorf D 'Reasoning about resources' *SAJHR* (1998) 330.

¹⁰⁸² Bilchitz D *Poverty and Fundamental Rights* (2007) 228.

¹⁰⁸³ Bilchitz D *Poverty and Fundamental Rights* (2007) 229.

¹⁰⁸⁴ Bilchitz D *Poverty and Fundamental Rights* (2007) 229.

¹⁰⁸⁵ Bilchitz D *Poverty and Fundamental Rights* (2007) 229.

The ICESCR provides that each state party should allocate the 'maximum of its available resources' in giving effect to ICESCR rights as previously stated.¹⁰⁸⁶ However, the phrase 'maximum of its available resources' is admittedly difficult to define and is consequently problematic when utilised as a measuring tool in assessing the extent of the compliance by the relevant state party in advancing ICESCR rights.¹⁰⁸⁷ It should be mandatory for the State to go beyond the finite resources of the National Treasury in seeking to quell human suffering and drive human development.¹⁰⁸⁸ Consequently, there is a definitive need to identify the outer limits of what could be defined as resources.¹⁰⁸⁹ It is apparent that resources are not confined to everything under the direct control of the state but the extent of the aforementioned 'outer limits' is up for debate.¹⁰⁹⁰ Thus, there is a demonstrated need to ascertain the extent of the resources that should be set aside for the advancement of ICESCR rights.¹⁰⁹¹ Consequently, it is necessary to ascertain the manner in which the compliance of the state (to discharge its resource allocation obligations) can be effectively undertaken.¹⁰⁹²

The contribution by Robertson augments the insights offered by Moellendorf and provides additional insight in relation to exploring the nature and extent of resources which are available to the state in seeking to realise the rights as provided for in the ICESCR.¹⁰⁹³ It should be

¹⁰⁸⁶ Article 2 (1) of the International Covenant

<http://www.refworld.org/docid/3ae6b36c0.html>, (accessed 31 July 2016).

¹⁰⁸⁷ Robertson R 'Measuring state compliance' (1994) 16 *Human Rights Quarterly* 694. Please see Moellendorf D 'Reasoning about resources' *SAJHR* (1998) 331.

¹⁰⁸⁸ Robertson R 'Measuring state compliance' (1994) 16 *Human Rights Quarterly* 695.

¹⁰⁸⁹ Robertson R 'Measuring state compliance' (1994) 16 *Human Rights Quarterly* 695.

¹⁰⁹⁰ Robertson R 'Measuring state compliance' (1994) 16 *Human Rights Quarterly* 695.

¹⁰⁹¹ Robertson R 'Measuring state compliance' (1994) 16 *Human Rights Quarterly* 695.

¹⁰⁹² Robertson R 'Measuring state compliance' (1994) 16 *Human Rights Quarterly* 695.

¹⁰⁹³ Robertson R 'Measuring state compliance' (1994) 16 *Human Rights Quarterly* 698. Please see Moellendorf D 'Reasoning about resources' *SAJHR* (1998) 331.

emphasised that increasing the number of indicators that can be applied to domestic spending will as a rule increase clarity as to whether a state has discharged its obligations in allocating the maximum available resources to advance ICESCR rights.¹⁰⁹⁴ Furthermore, the state could utilise its regulatory power (through the enactment of suitable legislation) to channel the flow of private funds in advancing ICESCR rights.¹⁰⁹⁵ However, the challenge of providing a true and comprehensive definition of ‘the maximum of its available resources’ is acknowledged.¹⁰⁹⁶ Nonetheless, one must not lose sight of the urgency of ICESCR rights in safeguarding the lives of vulnerable groups and the need to ensure that socio-economic rights take their rightful place alongside civil and political rights.¹⁰⁹⁷

3.6.2.2 Brief overview of renal dialysis services in present day South Africa

This section will serve to highlight the failure of the state to progressively realise access to the right to health (in relation to the provision of renal dialysis services) in South Africa.

Fabian notes that the South African population has increased from 40.436 million to approximately 52.275 million (between 1994 and 2012) while the treatment rate for end-stage renal disease (‘ESRD’) per million population (‘pmp’) has improved from 70 pmp in 1994 to 164 pmp in 2012.¹⁰⁹⁸ However, the treatment rate for the public sector in 2012 was virtually unchanged at 73pmp whilst the private sector (i.e. people

¹⁰⁹⁴ Robertson R ‘Measuring state compliance’ (1994) 16 *Human Rights Quarterly* 712.

¹⁰⁹⁵ Robertson R ‘Measuring state compliance’ (1994) 16 *Human Rights Quarterly* 713.

¹⁰⁹⁶ Robertson R ‘Measuring state compliance’ (1994) 16 *Human Rights Quarterly* 714.

¹⁰⁹⁷ Robertson R ‘Measuring state compliance’ (1994) 16 *Human Rights Quarterly* 714.

¹⁰⁹⁸ Fabian J *et al* ‘Rationing healthcare in South Africa: renal replacement therapy - a case in point’ *South African Medical Journal* (2014) 593 (hereafter Rationing healthcare in South Africa).

carrying medical insurance) had increased to 620pmp.¹⁰⁹⁹ Furthermore, the number of public sector treatment centres offering renal dialysis increased from 26 to 28 (between 1994 and 2012) while the private sector sported an increase from 5 to 163 renal dialysis treatment centres over the same time period.¹¹⁰⁰ Both Limpopo and Mpumalanga had failed to establish any public renal dialysis facility since the advent of democracy until the date of publication of the relevant article in 2014.¹¹⁰¹

Also, Fabian highlighted the extremely limited public awareness regarding the rationing (without review) of renal dialysis treatment as well as the subsequent denial of treatment at public hospitals.¹¹⁰² It is my view that the *Soobramoney* judgment should have been the starting point of an unerring focus on progressively rolling out renal dialysis services. Thus, there is an urgent need to dramatically increase public awareness as to the manner in which the state has failed to realise critical healthcare rights.¹¹⁰³

It follows that one should reference the insights offered by Professor Naicker in that approximately 18 000 South Africans require renal dialysis treatment.¹¹⁰⁴ She stated that dialysis machines cost about R200 000 each while the annual cost per patient receiving renal dialysis treatment was approximately R120 000 per year in the public sector.¹¹⁰⁵ It was highlighted that public hospitals throughout the country were

¹⁰⁹⁹ Fabian J *et al* 'Rationing healthcare in South Africa' *South African Medical Journal* (2014) 593.

¹¹⁰⁰ Fabian J *et al* 'Rationing healthcare in South Africa' *South African Medical Journal* (2014) 593.

¹¹⁰¹ Fabian J *et al* 'Rationing healthcare in South Africa' *South African Medical Journal* (2014) 593.

¹¹⁰² Fabian J *et al* 'Rationing healthcare in South Africa' *South African Medical Journal* (2014) 593. Please see Mayosi BM & Benatar SR 'Health and Health Care in South Africa – 20 Years after Mandela' *New England Journal of Medicine* (2014) 371: 1344 – 1353. Please also see *Soobramoney* (1998) para 3.

¹¹⁰³ Fabian J *et al* 'Rationing healthcare in South Africa' *South African Medical Journal* (2014) 593.

¹¹⁰⁴ Merrmannsen K 'Dialysis: a life-saver for thousands' available at <http://www.iol.co.za/dailynews/lifestyle/dialysis-a-life-saver-for-thousands-1831630>. (accessed 17 June 2016).

¹¹⁰⁵ Merrmannsen K 'Dialysis: a life-saver for thousands' available at <http://www.iol.co.za/dailynews/lifestyle/dialysis-a-life-saver-for-thousands-1831630>. (accessed 17 June 2016).

unable to treat desperately ill patients and that the waiting list crises had become acute.¹¹⁰⁶ Thus, a number of patients had passed on by the time a treatment slot had opened up for them.¹¹⁰⁷ Furthermore, Professor Naicker had emphasised the need for smaller satellite treatment centres to open throughout the country so as to make renal dialysis more accessible to ordinary people.¹¹⁰⁸ It is submitted that one can draw powerful parallels between the contribution by Fabian and Professor Naicker (as cited above) in the manner in which the state has failed to give effect to the progressive realisation of access to healthcare in relation to renal dialysis treatment.

It should be noted that Professor Naicker was a state witness in the *Soobramoney* matter in her capacity as the Head of the Renal Unit at Addington Hospital at the time. It is my contention that the present-day 'healthcare landscape' could have been significantly different if the Constitutional Court had compelled the state to properly account as to its available resources (as well as provide benchmarked sectoral targets) in the *Soobramoney* matter so as to progressively realise the right of access to healthcare in the time to come. Consequently, it is my view that a number of those very same renal-dialysis satellite centres (as mentioned by Professor Naicker) could have opened across the country over the past two decades and in the process minimise the suffering of ailing patients/fellow members of the nation-state.

In conclusion, it is submitted that the present-day failure of the state to provide renal dialysis treatment on a significantly expanded basis as compared to what was on offer in 1997, serves to highlight the critical need for the Constitutional Court to embrace an oversight role. In this

¹¹⁰⁶ Merrmannsen K 'Dialysis: a life-saver for thousands' available at <http://www.iol.co.za/dailynews/lifestyle/dialysis-a-life-saver-for-thousands-1831630>, (accessed 17 June 2016).

¹¹⁰⁷ Merrmannsen K 'Dialysis: a life-saver for thousands' available at <http://www.iol.co.za/dailynews/lifestyle/dialysis-a-life-saver-for-thousands-1831630>, (accessed 17 June 2016).

¹¹⁰⁸ Merrmannsen K 'Dialysis: a life-saver for thousands' available at <http://www.iol.co.za/dailynews/lifestyle/dialysis-a-life-saver-for-thousands-1831630>, (accessed 17 June 2016).

regard the state should be compelled to demonstrate the necessary accountability in progressively realising socio-economic rights by prioritising assistance for those who face imminent threats to their survival.

3.6.2.3 End stage renal failure as an expression of lived reality

An exposure to the anthropology discipline has highlighted the importance of understanding the plight of specific vulnerable groups in their immediate surroundings. This will ensure that a vivid picture of their lived reality is captured with regards to the actual deprivation/hazards that they have to endure on a daily basis. It is submitted that the aforementioned anthropological insights should colour the perceptions and subsequent decision-making of public officials in faithfully giving effect to their duties (as enshrined in the Constitution) so as to come to the aid of the aforementioned vulnerable groups. It is further submitted that those same public officials would in fact give effect to the communal obligations' focus of ubuntu through coming to the aid of those same vulnerable groups.

In this regard reference should be made to the unedited account of end-stage renal failure ('chronic renal failure') as prepared by Dr Taufiq Abrahams and inserted as Annexure 1 at the end of this thesis. Dr Abrahams qualified as a medical doctor at the University of Cape Town in 1999 after which he worked in the public and private sector (both locally and in the United Kingdom) before opening his private general practice in 2003. I engaged with Dr Abrahams from September 2015 onwards so as to develop a better understanding of how chronic renal failure presented medically as well as the manner in which it impacted on the lives of his patients (i.e. the perceived quality of life of both the patient as well as his/her loved ones). It is submitted that the account prepared by Dr Abrahams (and reproduced with his express permission) is the equivalent of 'field notes' as routinely prepared by anthropologists when immersed in an actual social field. The aforementioned field notes serve to shed light on the lived reality of members of a specific vulnerable

group (which is in fact a defining feature of this research) and seeks to compel the state to come to the aid of a specific vulnerable group through a targeted intervention strategy.

Furthermore, it is submitted that a key purpose served by Annexure 1 is to sensitise public officials to the bitter reality of end stage renal failure as well as the numerous positive consequences of receiving ongoing renal dialysis treatment. In this regard the diligent public official will no doubt cotton upon the fact that the absence of suitable renal dialysis facilities for the public will inevitably lead to desperate suffering on the part of patients afflicted with end stage renal failure. The aforementioned Annexure serves to provide a different perspective by placing the reader/public official in the shoes of a patient that has had to endure end stage renal failure and inevitably seeks to enhance the quality of their life through accessing treatment that should in fact be readily available. It is indeed a distinctly human trait to seek to continue to live a life of purpose through negotiating life-threatening health challenges as best one can – this is despite the contrary view of Sachs J who believed that those amongst us who are gravely ill (and cannot secure the relevant treatment) should accept the inevitability of approaching death.¹¹⁰⁹ It is submitted that it would be difficult for almost anyone to embrace the aforementioned philosophical perspective without protest (as proffered by Sachs J) if treatment for the same medical condition is in fact readily available at a price. It is further submitted that Annexure 1 serves to prick the conscience of the public official so that he/she can ultimately question whether they would want to endure a similar fate to that of Mr Soobramoney but for a decisive intervention by the state.

It should be noted that the purpose served by the newspaper article described below is to shed light on the human tragedy visited upon vulnerable members of the nation-state through a lack of accountability on the part of the state. In addition, the failure of the Constitutional Court to hold the state accountable to the required standard (if the overarching

¹¹⁰⁹ *Soobramoney* (1998) para 57.

goal is indeed to shape a nation-state in which all people are treated with equal concern) is clearly demonstrated. The aforementioned newspaper article had highlighted that the family of the late Mr. Soobramoney had collected two thirds of the funds required to purchase a renal dialysis machine.¹¹¹⁰ The family donated the funds to a medical facility to commemorate the first anniversary of the passing of Mr Soobramoney.¹¹¹¹ The balance of the funds, as required for the purchase of the machine, was contributed by the abovementioned medical facility.¹¹¹² It should be noted that Mr Soobramoney's final wish (before slipping into a coma) had been to urge his family to assist other renal dialysis patients by increasing the medical capacity on offer in South Africa through the acquisition of one additional machine.¹¹¹³

It is indeed a tragedy (that two decades after the *Soobramoney* judgment was issued) that the state is yet to devise and disseminate a sectoral healthcare plan with benchmarked targets to progressively increase the availability of renal dialysis treatment (let alone health care rights in general). Thus, there is a clear need for the state to account for treatment checklists that seek to routinely exclude patients rather than provide urgent medical treatment for treatable conditions.¹¹¹⁴ Furthermore, the notion of supposedly reasonable/impartial criteria to secure access to renal dialysis treatment makes a mockery of progressively giving effect to urgent subsistence rights in the absence of the state providing a detailed account of its available resources. In this regard reference is once again made to the preferred (and broadest) interpretation of 'available resources' as a means to properly benchmark the obligations of the state in giving effect to critical socio-economic rights. It follows that the Constitutional Court has to assume a pivotal oversight role to ensure

¹¹¹⁰ Govender P 'Family fulfils man's dying wish by helping kidney patients' Sunday Times 25 April 1999 (hereafter Family fulfils man's dying wish).

¹¹¹¹ Govender P 'Family fulfils man's dying wish' Sunday Times 25 April 1999.

¹¹¹² Govender P 'Family fulfils man's dying wish' Sunday Times 25 April 1999.

¹¹¹³ Govender P 'Family fulfils man's dying wish' Sunday Times 25 April 1999.

¹¹¹⁴ *Soobramoney* (1998) para 3. Please see Section 3.6.2.2.

that the state demonstrates the necessary accountability in progressively giving effect to socio-economic rights.

3.6.3 An analysis of the *Grootboom* case in order to demonstrate the obligations of the state in alleviating the desperate plight of vulnerable people

The Grootboom case dealt with the desperate plight of a group of homeless people that (eventually) sought refuge on a sports field with nothing but plastic sheets to shield them from the elements.¹¹¹⁵ The aforementioned group had initially approached the High Court seeking an order compelling the municipality to give effect to their constitutional duties which they believed should include the provision of basic shelter.¹¹¹⁶ The High Court granted a measure of relief¹¹¹⁷ to the aforementioned group and the government subsequently appealed to the Constitutional Court.¹¹¹⁸

A key drawback of the *Grootboom* judgment has been the nature of the orders issued by the Constitutional Court.¹¹¹⁹ The first order issued by the Court made a settlement between the parties an order of court.¹¹²⁰ The aforementioned settlement order provided for an undertaking that the *Grootboom* community would be furnished with temporary accommodation and that basic services (including running water and sanitation) would be made available.¹¹²¹ However, the settlement order was believed to have only been implemented 'to a certain extent'.¹¹²² Thus, those parts of the Court's order that required once-off involvement

¹¹¹⁵ *Grootboom* (2000) para 4.

¹¹¹⁶ *Grootboom* (2000) para 4.

¹¹¹⁷ *Grootboom and Others v Oostenberg Municipality and Others* 2000 (3) BCLR 277 (C). The High Court ordered the state to provide affected children and their parents with adequate basic shelter. In this regard the state was ordered to provide tents, portable latrines and an ongoing supply of water so as to meet the minimum standard of relief required.

¹¹¹⁸ *Grootboom* (2000) para 4.

¹¹¹⁹ Pillay K 'Implementing *Grootboom*' *ESR Review* (2002).

¹¹²⁰ *Grootboom* (2000). The first court order was made in terms of paragraph A1 - 8 of the agreed order as issued in September 2000.

¹¹²¹ *Grootboom* (2000). The first court order was made in terms of paragraph A1 - 8 of the agreed order as issued in September 2000.

¹¹²² Pillay K 'Implementing *Grootboom*' *ESR Review* (2002).

on the part of the municipality were executed but those that required an ongoing commitment (e.g. refuse removal) were seemingly not fulfilled.¹¹²³

The Constitutional Court handed down a second general order which is the one contained in the judgment and ordered the state ‘to devise and implement within its available resources a comprehensive and coordinated programme to progressively realise the right of access to adequate housing’.¹¹²⁴ The aforementioned programme was required to include measures such as an ‘accelerated land settlement programme’¹¹²⁵ to offer relief for people ‘who have no access to land, no roof over their heads, and who are living in intolerable conditions or crisis conditions.’¹¹²⁶ Thus, the Constitutional Court held that the housing programme of the state (with specific reference to the area under the control of the Cape Metropolitan Council) was not in keeping with the relevant requirements of the Constitution as ‘it failed to make reasonable provision for people in desperate need’.¹¹²⁷

The *Grootboom* case serves to demonstrate how the absence of accountability on the part of the public officials (in giving progressive effect to constitutionally guaranteed socio-economic rights) can exacerbate the plight of vulnerable groups that find themselves in perilous circumstances. Furthermore, it highlights how embracing ubuntu (on the part of public officials) can serve to colour and bolster the progressive realisation of subsistence rights. It is submitted that providing vulnerable groups with access to adequate housing will serve as a catalyst in assisting people to live lives of value (as perceived by them). This in turn will ensure the forging of social solidarity ideals as those same vulnerable people (who have benefited from access to

¹¹²³ Pillay K ‘Implementing Grootboom’ *ESR Review* (2002).

¹¹²⁴ *Grootboom* (2000) para 99.

¹¹²⁵ *Grootboom* (2000) para 99.

¹¹²⁶ *Grootboom* (2000) para 99.

¹¹²⁷ *Grootboom* (2000) para 99.

housing on a priority basis) will reap the benefits of living in a just and caring nation state in which all people are treated as having equal worth.

It is my submission that the illuminating insights offered by Waldron¹¹²⁸ serve as a fitting introduction (as well as backdrop) to the *Grootboom* case in highlighting the deprivation endured by homeless people in South Africa. Waldron describes the challenges of being homeless in America yet his description captures the harshness of the present day lived reality of homeless people in South Africa.¹¹²⁹ It is submitted that the compelling insights offered by Waldron serves to reinforce the illuminating contribution by Brand in casting light on the perpetual suffering of vulnerable people.¹¹³⁰

Waldron highlights his intention to describe the troubling reality of homelessness by utilising abstract legal principles rather than seeking to employ a communitarian ethic.¹¹³¹ He adopts the aforementioned approach as a means to highlight how homelessness can erode the most basic principles of liberty in much the same way as torture and other violations of human rights.¹¹³² It should be noted that the homeless person is 'utterly and at all times at the mercy of others' if he/she is on private property as he/she can be ejected at the behest of the property owner.¹¹³³ The manner in which South African law deals with present day eviction proceedings (i.e. the relevant property owner obtaining a court order prior to the eviction of people that have unlawfully settled on the land) is noted but the focus at present is to shed light on the nature and extent of deprivation as endured by homeless people.

Waldron describes a 'libertarian fantasy' in which all land in a society could be held as private property and how this could lead to a situation

¹¹²⁸ Waldron J 'Homelessness and the issue of freedom' (1992) *UCLA Law Review* 296 (hereafter Homelessness).

¹¹²⁹ Waldron J 'Homelessness' (1992) *UCLA Law Review* 296.

¹¹³⁰ Brand D 'What are socio-economic rights for?' (2003) 35.

¹¹³¹ Waldron J 'Homelessness' (1992) *UCLA Law Review* 296.

¹¹³² Waldron J 'Homelessness' (1992) *UCLA Law Review* 296.

¹¹³³ Waldron J 'Homelessness' (1992) *UCLA Law Review* 299.

where a homeless person would literally not be allowed to be anywhere.¹¹³⁴ It should be noted that the aforementioned 'libertarian fantasy' is indeed outside the realm of possibility but it serves to emphasise the extent of the vulnerability of homeless people in finding a public place to inhabit without being threatened with fines and/or removal the next instant.

The reality is that public property is the final refuge for vast numbers of homeless people.¹¹³⁵ However, there is an ever-increasing tendency to increase the regulation of the activities permitted at public property locations which almost inevitably leads to primal human tasks (e.g. urinating, washing, sleeping, cooking and eating) being prohibited.¹¹³⁶ Thus, it should be apparent that this will have a disastrous effect on homeless people that 'must live their whole lives on common land'.¹¹³⁷

It should be noted that every human action has a spatial component.¹¹³⁸ It follows that a (homeless) person who is not free to be in any place is in fact not free to do anything.¹¹³⁹ Thus, such a (homeless) person could be viewed as 'comprehensively unfree' if the libertarian paradise (in which all land is privately-owned) becomes a reality.¹¹⁴⁰ There is a need to demonstrate the fallacy of the belief that the homeless 'are in the relevant sense free to perform the same activities as the rest of us'.¹¹⁴¹ The reality is tragically different as the homeless possess neither the 'means' nor the 'power' to give effect to these freedoms.¹¹⁴² Thus, homelessness can in essence be defined as 'consisting of unfreedom'.¹¹⁴³

¹¹³⁴ Waldron J 'Homelessness' (1992) *UCLA Law Review* 300.

¹¹³⁵ Waldron J 'Homelessness' (1992) *UCLA Law Review* 301. Please see Port *Elizabeth Municipality v Various Occupiers* 2004 (12) BCLR 1268 (CC) para 2.

¹¹³⁶ Waldron J 'Homelessness' (1992) *UCLA Law Review* 301.

¹¹³⁷ Waldron J 'Homelessness' (1992) *UCLA Law Review* 301.

¹¹³⁸ Waldron J 'Homelessness' (1992) *UCLA Law Review* 301.

¹¹³⁹ Waldron J 'Homelessness' (1992) *UCLA Law Review* 301.

¹¹⁴⁰ Waldron J 'Homelessness' (1992) *UCLA Law Review* 302.

¹¹⁴¹ Waldron J 'Homelessness' (1992) *UCLA Law Review* 302.

¹¹⁴² Waldron J 'Homelessness' (1992) *UCLA Law Review* 305. Please see Brand D 'What Are Socio-Economic Rights For?' (2003) 35 - 36.

¹¹⁴³ Waldron J 'Homelessness' (1992) *UCLA Law Review* 306.

Waldron describes how the act of urination is a 'necessary and desirable' function and it consequently follows that there is no law against urination.¹¹⁴⁴ However, urinating in public (outside of public restrooms) is generally prohibited and serves to highlight the desperate plight of homeless people in trying to find a way to do the abovementioned daily primal tasks.¹¹⁴⁵ Waldron rightfully states that there is 'nothing particularly dignified' about sleeping or urinating but there is 'something deeply and inherently undignified' in being stopped from doing so.¹¹⁴⁶ This leads Waldron to describe the aforementioned endless stream of indignities visited upon the homeless as tantamount to torture.¹¹⁴⁷ Thus, Waldron believes that we should bear collective shame as a people for enacting laws that seek to degrade our fellow human beings for want of a private property to call home.¹¹⁴⁸

It is fair comment that the homeless are compelled to endure not only a lack of freedom but also hunger, adverse weather conditions as well as the ever-present threat of physical and emotional harm.¹¹⁴⁹ However, Waldron sought to focus on freedom as a means to highlight the calamitous consequences of forcing a class of persons to endure 'all of the restrictions and nothing else, a class of persons for whom property is nothing but a way of limiting their freedom'.¹¹⁵⁰ The insightful contribution by Waldron provides a fitting backdrop for an exploration of specific aspects of the *Grootboom* judgment (as detailed below) so as to bear in mind the numerous hazards and indignities that homeless people have to endure as a matter of course. The contribution by Waldron also serves to cast light on the manner in which ubuntu should be embraced by public officials (through giving effect to communal obligations) so as

¹¹⁴⁴ Waldron J 'Homelessness' (1992) *UCLA Law Review* 312.

¹¹⁴⁵ Waldron J 'Homelessness' (1992) *UCLA Law Review* 312.

¹¹⁴⁶ Waldron J 'Homelessness' (1992) *UCLA Law Review* 320.

¹¹⁴⁷ Waldron J 'Homelessness' (1992) *UCLA Law Review* 296.

Please see *Grootboom* (2000) para 4. Please also see *Soobramoney* (1998) para 8.

¹¹⁴⁸ Waldron J 'Homelessness' (1992) *UCLA Law Review* 320.

¹¹⁴⁹ Waldron J 'Homelessness' (1992) *UCLA Law Review* 323.

¹¹⁵⁰ Waldron J 'Homelessness' (1992) *UCLA Law Review* 324.

to fashion a just and caring society by treating all people as having equal worth.

The General Comments seek to provide content to the rights endorsed in the ICESCR (as previously detailed) and the UN Committee has stated that socio-economic rights possess a minimum core obligation which must be realised by state parties.¹¹⁵¹ However, Justice Yacoob openly criticised the minimum core approach (as adopted by the UN Committee) and stated that it is not 'necessary to decide whether it is appropriate for a court to determine in the first instance the minimum core of a right'.¹¹⁵² In this regard it should be noted that Justice Yacoob did not in fact reject the minimum core approach – it follows that the Constitutional Court could endorse this approach in a contemporary context.¹¹⁵³ Justice Yacoob believed that the primary issue that had to be addressed by the Court was to ascertain the reasonableness of the measures adopted by the state to realise the rights enshrined in section 26.¹¹⁵⁴ Justice Yacoob held that the state had demonstrated the implementation of a housing programme of which the medium and long term goals were beyond reproach.¹¹⁵⁵ However, the Constitutional Court held that the state had not demonstrated the necessary reasonableness in devising a housing strategy which failed to offer relief to those that demonstrated urgent need.¹¹⁵⁶ Consequently, the housing programme of the state did not pass constitutional muster.¹¹⁵⁷

Reasonableness is defined as including those decisions that are correct as well as those decisions that mark the space between that which is correct and that which falls short of being unpredictable.¹¹⁵⁸ It follows that judicial review makes allowance for a 'margin of appreciation' which

¹¹⁵¹ General Comment No. 3: <http://www.refworld.org/docid/4538838e10.html>, (accessed 1 August 2016).

¹¹⁵² *Grootboom* (2000) para 33.

¹¹⁵³ Bilchitz D *Poverty and Fundamental Rights* (2007) 141.

¹¹⁵⁴ *Grootboom* (2000) para 33.

¹¹⁵⁵ *Grootboom* (2000) para 64.

¹¹⁵⁶ *Grootboom* (2000) para 66.

¹¹⁵⁷ *Grootboom* (2000) para 66.

¹¹⁵⁸ Bilchitz D 'Giving socio-economic rights teeth' *SALJ* (2002) 495.

ensures that the original decision-making body retains a certain amount of latitude in making the decisions entrusted to it.¹¹⁵⁹ Consequently, the realisation of socio-economic rights by the legislature and the executive is no different.¹¹⁶⁰ Thus, the Constitutional Court has elected to counter concerns about the judicial review of socio-economics rights by adopting a reasonableness approach which readily demonstrates measured deference to the legislature and the executive.¹¹⁶¹ However, the right enshrined in section 26 must be progressively realised by the state rather than adhering to a hollow notion of what constitutes reasonable conduct on the part of the state.¹¹⁶² Thus, the abovementioned deference owed to the executive and legislature is only concerned with granting them a certain amount of latitude in electing from a range of suitable mechanisms to realise the right in question.¹¹⁶³ However, that same deference owed to the Legislature and Executive should in no way impede the Constitutional Court from providing socio-economic rights with critical determinate content.¹¹⁶⁴

Bilchitz believes that the reasonableness of state conduct must rightly be assessed against the 'ends, purposes or obligations' demanded by the Constitution.¹¹⁶⁵ Furthermore, the state is duty-bound to provide for the basic needs of its people - this entails a process of balancing all the relevant constitutional obligations to ascertain the preferred course of action which resonates with the primary constitutional values of dignity, freedom and equality.¹¹⁶⁶

A legitimate concern is raised by Bilchitz in that the state is directed by the Constitutional Court in *Grootboom* to 'provide relief'¹¹⁶⁷ which does

¹¹⁵⁹ Bilchitz D 'Giving socio-economic rights teeth' *SALJ* (2002) 495.

¹¹⁶⁰ Bilchitz D 'Giving socio-economic rights teeth' *SALJ* (2002) 495.

¹¹⁶¹ Bilchitz D 'Giving socio-economic rights teeth' *SALJ* (2002) 495. Please see *Grootboom* (1998) para 41. Please also see *Soobramoney* (1998) para 29 and *TAC* (2000) para 36.

¹¹⁶² Bilchitz D 'Giving socio-economic rights teeth' *SALJ* (2002) 496.

¹¹⁶³ Bilchitz D 'Giving socio-economic rights teeth' *SALJ* (2002) 496.

¹¹⁶⁴ Bilchitz D 'Giving socio-economic rights teeth' *SALJ* (2002) 496.

¹¹⁶⁵ Bilchitz D *Poverty and Fundamental Rights* (2007) 143.

¹¹⁶⁶ Bilchitz D *Poverty and Fundamental Rights* (2007) 146.

¹¹⁶⁷ *Grootboom* (2000) para 99.

not offer guidance as to the specific obligations of the state.¹¹⁶⁸ Also, it does nothing to prevent the state from employing delaying tactics and/or stonewalling progress in providing for the needs of desperate people.¹¹⁶⁹ In this regard a minimum core obligation approach would provide a clear benchmark in terms of the clear deliverables of the state regarding the provision of access to shelter/housing for people in dire need.¹¹⁷⁰ This would in turn promote legal certainty and augment the protection on offer for an extremely vulnerable segment of society.¹¹⁷¹ Furthermore, the Constitutional Court did not impose a time limit on the state to devise a policy¹¹⁷² to cater for the specific housing requirements of people in desperate need.¹¹⁷³ It is likely that the Constitutional Court would have insisted on a clear timeframe (within which the state had to devise the said policy) if the Court had embraced the minimum core obligation approach.¹¹⁷⁴ This is due to the fact that the urgency of the interest to be realised would have been the focal point of any discussion/deliberation founded on the minimum core obligation approach.¹¹⁷⁵

The Constitutional Court's concern in the *Grootboom* matter can reasonably be construed as being narrow in the sense that it focussed on 'the logical consistency of the state's housing policy' as it did not specifically deal with people in a desperate situation that had nowhere to live.¹¹⁷⁶ The Court (unfortunately) elected not to apply a substantive standard which would have brought into focus the need for the efforts and expenditure of the state to reflect 'the differing degrees of need'¹¹⁷⁷ amongst the people that the state is meant to serve.¹¹⁷⁸ The manner in which the state had implemented the *Grootboom* court order seemed to

¹¹⁶⁸ Bilchitz D *Poverty and Fundamental Rights* (2007) 150.

¹¹⁶⁹ Bilchitz D *Poverty and Fundamental Rights* (2007) 150.

¹¹⁷⁰ Bilchitz D *Poverty and Fundamental Rights* (2007) 150.

¹¹⁷¹ Bilchitz D *Poverty and Fundamental Rights* (2007) 150.

¹¹⁷² *Grootboom* (2000) para 99.

¹¹⁷³ Bilchitz D *Poverty and Fundamental Rights* (2007) 150.

¹¹⁷⁴ Bilchitz D *Poverty and Fundamental Rights* (2007) 150.

¹¹⁷⁵ Bilchitz D *Poverty and Fundamental Rights* (2007) 150.

¹¹⁷⁶ Brand D 'What are socio-economic rights for?' (2003) 50.

¹¹⁷⁷ *Grootboom* (2000) para 69.

¹¹⁷⁸ Brand D 'What are socio-economic rights for?' (2003) 50.

reflect the approach of the Constitutional Court in the sense that the provincial housing budgets as a whole did not reflect a pressing concern for those in desperate need.¹¹⁷⁹ This was highlighted by nominal allocations (from the existing housing budgets) to address the plight of those in desperate need.¹¹⁸⁰ Thus, Brand refers with approval to the contribution by Pillay¹¹⁸¹ who had analysed the flawed manner in which the *Grootboom* judgment had been implemented.¹¹⁸²

Roux notes that the *Grootboom* decision obliged the government to focus on 'the human interests at stake and sensible priority-setting' without compelling the state to provide protection for every person 'whose socio-economic needs are at risk'.¹¹⁸³ Furthermore, the *Grootboom* decision did not compel the state to prioritise its spending in a specified manner.¹¹⁸⁴ The reality is that the aforementioned decision provides the necessary authority for the state to merely demonstrate that its social and economic policies are sufficiently broad/diverse to cater for the needs of vulnerable people.¹¹⁸⁵ However, the Legislature and Executive retain the power to consider the timing and/or sequencing in which it seeks to meet its diverse social obligations.¹¹⁸⁶ Thus, Roux is correct in emphasising that the state should be deterred if it seeks to allocate scarce resources to relatively privileged groups for whom such assistance is a tangible, additional benefit rather than an urgent need.¹¹⁸⁷

It should be noted that the Constitutional Court rejected the arguments of the *amici*¹¹⁸⁸ in relation to General Comment 3¹¹⁸⁹ which sought to

¹¹⁷⁹ Brand D 'What are socio-economic rights for?' (2003) 50.

¹¹⁸⁰ Brand D 'What are socio-economic rights for?' (2003) 50.

¹¹⁸¹ Please see Section 3.6.3.1.

¹¹⁸² Brand D 'What are socio-economic rights for?' (2003) 50.

¹¹⁸³ Roux T 'Understanding Grootboom' (2002) *Forum Constitutional* 41.

¹¹⁸⁴ Roux T 'Understanding Grootboom' (2002) *Forum Constitutional* 41.

¹¹⁸⁵ Roux T 'Understanding Grootboom' (2002) *Forum Constitutional* 41.

¹¹⁸⁶ Roux T 'Understanding Grootboom' (2002) *Forum Constitutional* 41.

¹¹⁸⁷ Roux T 'Understanding Grootboom' (2002) *Forum Constitutional* 42.

¹¹⁸⁸ *Grootboom* (2000) para 33.

¹¹⁸⁹ General Comment No. 3: <http://www.refworld.org/docid/4538838b2.html>, (accessed 1 August 2016).

compel State Parties to 'devote all the resources at their disposal first to satisfy the 'minimum core content' of the right to adequate housing.¹¹⁹⁰ In this regard the Constitutional Court held that there was insufficient evidence adduced (in the proceedings) as to the minimum core content of the right of access to housing - especially in light of regional variations in housing requirements and the nature of the rural/urban divide.¹¹⁹¹ Roux is critical of the cursory manner in which the Constitutional Court dealt with the 'available resources' element but he was not surprised in light of the decision by the Constitutional Court to distance itself from the minimum core philosophy.¹¹⁹² He is justifiably concerned, as the manner in which resources are allocated is indeed critical, especially in a country with limited resources such as South Africa.¹¹⁹³ Also, he voices his concern with the manner in which the Constitutional Court had left the executive and the legislature to decide¹¹⁹⁴ the most critical policy issues in *Grootboom*.¹¹⁹⁵ Roux believes that the most positive aspect of the *Grootboom* judgment was that a social programme would not only have to be 'reasonably designed, but also reasonably implemented'.¹¹⁹⁶

Roux refers to the remedies suggested by Trengrove (in light of the empowering nature of section 172 (1) (b) of the Constitution) in a paper published two years before the *Grootboom* judgment.¹¹⁹⁷ It aptly demonstrates that the court order that was ultimately issued in *Grootboom* fell woefully short of the expectation of a number of constitutional experts in advancing the realisation of critical socio-economic rights.¹¹⁹⁸ The Constitutional Court should at the very least have ordered the state to return to the Court to provide a detailed plan as to the manner in which the housing needs of people (that had to

¹¹⁹⁰ Roux T 'Understanding Grootboom' (2002) *Forum Constitutional* 45.

¹¹⁹¹ *Grootboom* (2000) para 33.

¹¹⁹² Roux T 'Understanding Grootboom' (2002) *Forum Constitutional* 50.

¹¹⁹³ Roux T 'Understanding Grootboom' (2002) *Forum Constitutional* 50.

¹¹⁹⁴ *Grootboom* (2000) para 96.

¹¹⁹⁵ Roux T 'Understanding Grootboom' (2002) *Forum Constitutional* 50.

¹¹⁹⁶ Roux T 'Understanding Grootboom' (2002) *Forum Constitutional* 50.

¹¹⁹⁷ Trengrove W 'Judicial remedies for violations of socio-economic rights' *ESR Review* Volume 1 No 4 March (1999).

¹¹⁹⁸ Roux T 'Understanding Grootboom' (2002) *Forum Constitutional* 51.

endure intolerable living conditions) would be progressively realised as a matter of urgency.¹¹⁹⁹ Roux rightfully points out that in the absence of the aforementioned enforcement mechanism (i.e. a suitably benchmarked sectoral plan devised by the state) that the order of constitutional invalidity only served to embarrass the state and nothing more.¹²⁰⁰ Thus, the Constitutional Court had in fact issued a remedy without a sanction and it was consequently of no practical value to vulnerable people ‘whose socio-economic rights constitute their sole claim to citizenship’.¹²⁰¹

3.6.3.1 The flawed implementation of the *Grootboom* court order(s)

There is a specific focus on the work by Pillay as it provides definitive insight on the lack of accountability (and the absence of political will) on the part of the state to prioritise the needs of homeless people that find themselves in perilous circumstances. Also, it serves to demonstrate the need for the Constitutional Court to provide determinate content for socio-economic rights so as to be in a position to hold the state to account in giving effect to the progressive realisation of socio-economic rights. Furthermore, Pillay’s work highlights the need for the SAHRC to fully discharge its mandate regarding the monitoring and enforcement of socio-economic rights.¹²⁰² It is submitted that the SAHRC should have done more with regards to the monitoring (and enforcement) of the *Grootboom* judgment as discussed below. It is further submitted that public officials that are imbued with ubuntu will demonstrate the necessary accountability (in giving effect to socio-economic rights) as a means of paying homage to the deep-seated belief that all members of a just and caring nation-state are interconnected and interdependent.

Pillay believes that the real-world impact of the *Grootboom* judgment on the housing situation of the actual *Grootboom* community (as well as other people who find themselves in a similarly desperate situation) has

¹¹⁹⁹ Roux T ‘Understanding Grootboom’ (2002) *Forum Constitutional* 51.

¹²⁰⁰ Roux T ‘Understanding Grootboom’ (2002) *Forum Constitutional* 51.

¹²⁰¹ Roux T ‘Understanding Grootboom’ (2002) *Forum Constitutional* 51.

¹²⁰² Section 184(3) of the Constitution of the Republic of South Africa, 1996.

been limited at best.¹²⁰³ This is despite the fact that the judgment was 'hailed as a great victory for the homeless and landless people of South Africa'.¹²⁰⁴ Nonetheless, Pillay acknowledges the significant contribution of the *Grootboom* judgment in developing the jurisprudence on socio-economic rights as well as the nature of the positive duties borne by the state in giving effect to these rights.¹²⁰⁵

A shortcoming of the Constitutional Court's general order is that it was declaratory in nature and it did not set down specific time frames within which the state had to act as previously described.¹²⁰⁶ The net effect of the aforementioned shortcoming was that a year after the order had been issued there was little apparent change in the housing policy for people in desperate need/crisis situations.¹²⁰⁷ In this regard the SAHRC had monitored the situation and tabled a report highlighting that it had taken a full year for the local administration (i.e. the City of Cape Town) and its provincial counterpart (i.e. the Western Cape Provincial Administration) to come to a decision as to where the 'locus of responsibility' lay with regards to giving effect to the terms of the *Grootboom* court order.¹²⁰⁸ Furthermore, the efforts of the aforementioned two administration entities was confined to devising a plan to bring about the permanent resettlement of the Wallacedene community.¹²⁰⁹ Thus, it was readily apparent that there was a palpable lack of understanding that giving effect to the judgment required 'systemic changes to national, provincial and local housing programmes to cater for people in desperate and crisis situations'.¹²¹⁰

However, the Constitutional Court elected not to play any role (both in the interim and general order) in supervising or overseeing the

¹²⁰³ Pillay K 'Implementing Grootboom' *ESR Review* (2002).

¹²⁰⁴ Pillay K 'Implementing Grootboom' *ESR Review* (2002).

¹²⁰⁵ Pillay K 'Implementing Grootboom' *ESR Review* (2002).

¹²⁰⁶ *Grootboom* (2000) para 96.

¹²⁰⁷ Pillay K 'Implementing Grootboom' *ESR Review* (2002).

¹²⁰⁸ Pillay K 'Implementing Grootboom' *ESR Review* (2002). Please see <https://www.sahrc.org.za/index.php/publications>, (accessed 12 January 2018).

¹²⁰⁹ Pillay K 'Implementing Grootboom' *ESR Review* (2002). Please see <https://www.sahrc.org.za/index.php/publications>, (accessed 12 January 2018).

¹²¹⁰ Pillay K 'Implementing Grootboom' *ESR Review* (2002).

implementation of the orders.¹²¹¹ The Court had stated in the judgment that the SAHRC 'had agreed to monitor and report on the compliance of the state with its section 26 obligations'.¹²¹² However, the SAHRC was not required to report back to the Constitutional Court in the actual order issued by the Court.¹²¹³ Also, the SAHRC was seemingly focused on monitoring the implementation of the first order (in relation to the Grootboom community).¹²¹⁴ Thus, there was consequently a troubling absence of information as to whether 'nationally and provincially there is compliance with the obligation to put in place and implement accelerated land release programmes'.¹²¹⁵

The SAHRC submitted a Report to the Constitutional Court over a year after the issuing of the *Grootboom* judgment but the aforementioned Report did not provide information as to the efforts (on the part of the SAHRC) to ascertain whether (and to what extent) the three spheres of government had given effect to the court order.¹²¹⁶ Furthermore, the aforementioned Report did not provide information as to subsequent actions taken (by the state) to revise/augment the national housing programme to ensure its alignment with the *Grootboom* judgment.¹²¹⁷ However, Pillay believed (at the time) that the Constitutional Court 'does not regard itself as still seized' with this matter in light of the lack of a public response (by the Constitutional Court) to the Report tabled by the SAHRC.¹²¹⁸ Consequently, it is noted that a key challenge for organisations working in the field of housing rights is 'monitoring and advocacy aimed at ensuring that the state's housing programmes give

¹²¹¹ *Grootboom* (2000) para 97.

¹²¹² *Grootboom* (2000) para 97.

¹²¹³ Pillay K 'Implementing Grootboom' *ESR Review* (2002).

¹²¹⁴ Pillay K 'Implementing Grootboom' *ESR Review* (2002). Please see <https://www.sahrc.org.za/index.php/publications>, (accessed 12 January 2018).

¹²¹⁵ Pillay K 'Implementing Grootboom' *ESR Review* (2002).

¹²¹⁶ Pillay K 'Implementing Grootboom' *ESR Review* (2002). Please see <https://www.sahrc.org.za/index.php/publications>, (accessed 12 January 2018).

¹²¹⁷ Pillay K 'Implementing Grootboom' *ESR Review* (2002). Please see <https://www.sahrc.org.za/index.php/publications>, (accessed 12 January 2018).

¹²¹⁸ Pillay K 'Implementing Grootboom' *ESR Review* (2002).

effect to the *Grootboom* judgment' with a specific emphasis on providing for the needs of people in crisis situations.¹²¹⁹

Pillay emphasises that for a remedy to be appropriate that same remedy must be effective.¹²²⁰ In this regard Pillay refers to *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC) in which the Court held that:

'In our context an appropriate remedy must mean an effective remedy, for without effective remedies for breach, the values underlying and the rights entrenched in the Constitution cannot be properly upheld or enhanced. Particularly in a country in which so few have the means to enforce their rights through the courts, it is essential on those occasions when the legal process does establish that an infringement of an entrenched right has occurred, it be effectively vindicated. The courts have a particular responsibility in this regard and are obliged to "forge new tools" and shape innovative remedies, if needs be, to achieve this goal.'¹²²¹

De Vos rightfully expressed his disappointment in the *Grootboom* judgment in that the individual applicants were not provided with relief.¹²²² De Vos sought to focus on the importance of the reasoning employed by the Constitutional Court in confirming the critical and indivisible link between the aspirational goals to be found in the equality guarantee of section 9 and the aspirational goals contained in the various socio-economic rights.¹²²³ Furthermore, De Vos notes that the opening paragraph of the *Grootboom* judgment¹²²⁴ highlights that the primary purpose of the Constitution is to give effect to the achievement

¹²¹⁹ Pillay K 'Implementing Grootboom' *ESR Review* (2002).

¹²²⁰ Pillay K 'Implications for the enforcement of socio-economic rights' (2003) *Law, Democracy and Development* 258.

¹²²¹ *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC) para 20.

¹²²² De Vos P 'Grootboom' *SAJHR* (2001) 269.

¹²²³ De Vos P 'Grootboom' *SAJHR* (2001) 269.

¹²²⁴ *Grootboom* (2000) para 1.

of one overarching goal in creating a society based on the principles of equality, human dignity and freedom.¹²²⁵

De Vos asserts, by way of an example, that a finding by the Constitutional Court in *Grootboom* that a failure by the state to cater for the needs of the homeless is unreasonable (and consequently fell foul of section 26) could play a pivotal role in determining whether the inaction of the state would not also be considered an infringement of section 9(3) of the Constitution.¹²²⁶ De Vos consequently believes that reading the different sections of the Constitution together in this manner will bolster the 'transformative nature of the Constitution in general and of the right to equality in particular'.¹²²⁷

De Vos notes, with reference to section 26(2), that the Constitutional Court failed to furnish any interpretation of the positive obligation to 'promote and fulfil' with respect to the right of access that would have permitted the applicants to benefit from individual relief.¹²²⁸ However, De Vos argues that individuals cannot demand access to shelter or housing even though section 26 has created a right that can be enforced by individuals.¹²²⁹ In this regard the individual merely has a right to demand that the state should implement measures to provide for the housing needs of those individuals that are unable to fend for themselves until such time as they can secure access to adequate housing.¹²³⁰ Thus, in enforcing the right of access to housing (and with due regard for the transformative vision of the Constitution) the Constitutional Court is obliged to assess the conduct of the state as to whether any steps had been taken and whether those steps taken were appropriate.¹²³¹ The Court will ultimately focus on the reasonableness of the state's plan (as well as the implementation of that plan) as a means to ascertain whether

¹²²⁵ De Vos P 'Grootboom' *SAJHR* (2001) 269.

¹²²⁶ De Vos P 'Grootboom' *SAJHR* (2001) 270.

¹²²⁷ De Vos P 'Grootboom' *SAJHR* (2001) 270.

¹²²⁸ De Vos P 'Grootboom' *SAJHR* (2001) 271.

¹²²⁹ De Vos P 'Grootboom' *SAJHR* (2001) 271.

¹²³⁰ De Vos P 'Grootboom' *SAJHR* (2001) 271.

¹²³¹ *Grootboom* (2000) para 41.

the state had discharged its positive obligations in giving effect to the right of access to housing.¹²³²

The abovementioned commentary by De Vos is illuminating in describing the preferred approach of the Constitutional Court in focusing on the reasonableness of the conduct of the state in giving effect to key subsistence rights. However, the aforementioned approach (as adopted by the Court) is indeed flawed as it fails to prioritise the actual suffering endured by a vulnerable group. It follows that the Court should in fact determine whether the plan as devised (and subsequently implemented) by the state will in fact bring an end to the actual suffering endured by that same vulnerable group rather than focussing on a myopic assessment as to whether the conduct of the state is reasonable and logical in the circumstances.

Scott and Alston provide telling insights regarding the manner in which socio-economic rights enshrined in the Constitution overlap with specific articles in the ICESCR.¹²³³ In this regard section 26 (2) of the 1996 Constitution is remarkably similar to Article 2 (1) of the ICESCR but for two differences.¹²³⁴ Section 26(2) utilises the phrase ‘within available resources’ while the ICESCR states ‘to the maximum of available resources’.¹²³⁵ It could ostensibly be argued that section 26(2) imposes a less exacting standard even though it is difficult to discern any practical difference between the two versions.¹²³⁶ In this regard Chenwi and Hardowar believe that the ‘obligation is not formulated in the same way’.¹²³⁷ Chenwi and Hardowar point out that article 2(1) of the ICESCR obliges a state party to utilise the ‘maximum of its resources’ while the relevant provision in the Constitution provides for ‘within available resources’.¹²³⁸ Consequently, it can be implied that the Constitution

¹²³² De Vos P ‘Grootboom’ *SAJHR* (2001) 272. Please see *Grootboom* (2000) para 41.

¹²³³ Scott C & Alston P ‘Adjudicating constitutional priorities’ *SAJHR* (2000) 262.

¹²³⁴ Scott C & Alston P ‘Adjudicating constitutional priorities’ *SAJHR* (2000) 262.

¹²³⁵ Scott C & Alston P ‘Adjudicating constitutional priorities’ *SAJHR* (2000) 262.

¹²³⁶ Scott C & Alston P ‘Adjudicating constitutional priorities’ *SAJHR* (2000) 262.

¹²³⁷ Chenwi L & Hardowar R ‘Promoting socio-economic rights’ *ESR Review* (2010) 4.

¹²³⁸ Chenwi L & Hardowar R ‘Promoting socio-economic rights’ *ESR Review* (2010) 4.

does not oblige the state to provide anything over and above its available resources whereas the ICESCR is viewed as taking a stronger stand in relation to the use of resources.¹²³⁹

It should be noted that the aforementioned views of Chenwi and Hardowar is at odds with the views of Scott and Alston as endorsed in this thesis. In this regard Scott and Alston are correct in highlighting that the courts must consider international law when interpreting the Bill of Rights and it is apparent that the courts would be hard pressed to draw a negative inference in light of the word 'maximum' not being included in the relevant text.¹²⁴⁰ The second difference is that the 1996 Constitution requires 'reasonable...measures' to be implemented while the ICESCR provides for 'all appropriate means'.¹²⁴¹ Consequently, Scott and Alston rightfully view the aforementioned difference as negligible.¹²⁴²

Scott and Alston believe that the state is probably unable to resolve a wide-ranging social rights crisis in anything but the long term.¹²⁴³ However, the state can certainly lessen the impact of the aforementioned crisis by ensuring that it adopts a set of objectives and policies that capture the nature and extent of its constitutional obligations (owed in terms of section 26) within a reasonable time period.¹²⁴⁴ Furthermore, the aforementioned objectives and policies should prioritise the adoption of a minimum core content of the right to housing in the shortest time period possible.¹²⁴⁵

In this regard the Right to Adequate Housing provides insightful guidance on the manner in which an accountable state should strive to alleviate the intolerable living conditions of vulnerable groups (such as the Grootboom community).¹²⁴⁶ The concept of adequacy in housing

¹²³⁹ Chenwi L & Hardowar R 'Promoting socio-economic rights' *ESR Review* (2010) 4.

¹²⁴⁰ Scott C & Alston P 'Adjudicating constitutional priorities' *SAJHR* (2000) 262.

¹²⁴¹ Scott C & Alston P 'Adjudicating constitutional priorities' *SAJHR* (2000) 262.

¹²⁴² Scott C & Alston P 'Adjudicating constitutional priorities' *SAJHR* (2000) 262.

¹²⁴³ Scott C & Alston P 'Adjudicating constitutional priorities' *SAJHR* (2000) 262.

¹²⁴⁴ Scott C & Alston P 'Adjudicating constitutional priorities' *SAJHR* (2000) 262.

¹²⁴⁵ Scott C & Alston P 'Adjudicating constitutional priorities' *SAJHR* (2000) 262.

¹²⁴⁶ *General Comment No. 4*: <http://www.refworld.org/docid/47a7079a1.html>. (accessed 1 August 2016).

delivery is in part determined by 'social, economic, cultural, climatic, ecological and other factors'.¹²⁴⁷ However, the concept of adequacy can be expanded in such a way so as to find application 'in any particular context' by embracing the following factors: Legal Security of Tenure; Availability of Services, Materials, Facilities and Infrastructure; Affordability; Habitability; Accessibility; Location and Cultural Adequacy.¹²⁴⁸

Scott and Alston believed that the contents of General Comment 4 (in relation to the Right to Adequate Housing) should be recognised as requiring special consideration (at the time) in the impending *Grootboom* appeal to the Constitutional Court.¹²⁴⁹ This was deemed necessary as it was directly relevant to the issues being deliberated upon as well as the manner in which the UN Committee had employed the values of equality, dignity and security in exploring the notion of adequacy.¹²⁵⁰ Furthermore, General Comment 7 was said to provide for the normative content of the right to adequate housing.¹²⁵¹

It is indeed a tragedy that the Constitutional Court elected not to focus on the deprivation and suffering endured by the *Grootboom* community. The narrow focus adopted by the Constitutional Court (in ascertaining the reasonableness of both the state programme and its subsequent implementation) served to consign the suffering of a vulnerable group to the periphery while permitting the state to essentially skirt responsibility for progressively easing the plight of homeless people. It is submitted that the Constitutional Court should focus on the duties of the state in progressively realising the guaranteed socio-economic rights of vulnerable groups (as enshrined in the Constitution) rather than confining itself to ascertaining the reasonableness of state conduct. Thus, there is a pressing need for public officials to contemplate the

¹²⁴⁷ Point 8 of General Comment No. 4:
<http://www.refworld.org/docid/47a7079a1.html>, (accessed 1 August 2016).

¹²⁴⁸ Point 8 of General Comment No. 4:
<http://www.refworld.org/docid/47a7079a1.html>, (accessed 1 August 2016).

¹²⁴⁹ Scott C & Alston P 'Adjudicating constitutional priorities' *SAJHR* (2000) 223.

¹²⁵⁰ Scott C & Alston P 'Adjudicating constitutional priorities' *SAJHR* (2000) 223.

¹²⁵¹ Scott C & Alston P 'Adjudicating constitutional priorities' *SAJHR* (2000) 226.

actual suffering and deprivation as endured by vulnerable groups. It is my contention that the communal obligations' focus of ubuntu draws attention to the aforementioned plight of vulnerable groups and will promote the accountability of public officials (in giving effect to socio-economic rights) if ubuntu is fully embraced by those same public officials.

3.6.4 An analysis of the *TAC* case so as to cast light on the plight of specific vulnerable groups and the pressing need for the state to address pervasive shortcomings in the health sector

This thesis will seek to analyse specific aspects of the *TAC*¹²⁵² case as well as the pivotal contribution of the Treatment Action Campaign. This will serve to demonstrate how the failings of the state can be remedied by civil society banding together and subsequently engaging in constructive dialogue and/or lobbying the state (in addition to litigation) as a means to secure access to constitutionally guaranteed rights. Furthermore, it is of critical importance for public officials to embrace their duties regarding the progressive realisation of subsistence rights (as enshrined in the Constitution) so as to ease the plight of vulnerable groups. It is submitted that ubuntu, understood as giving effect to communal obligations, can serve to colour and bolster the accountability of the 'so-transformed diligent public official' in coming to the aid of vulnerable groups.

The *TAC* case dealt with the policy adopted by the South African government in making the antiretroviral drug, Nevirapine, available as a means to reduce the probability of HIV transmission from mother to child at birth.¹²⁵³ In July 2000 the manufacturers of Nevirapine offered to make the drug available for 5 years at no cost to the state.¹²⁵⁴ However, it was still not possible for people to secure Nevirapine in the public sector until May 2001 when a policy change provided for the utilisation of Nevirapine

¹²⁵² *TAC* (2002).

¹²⁵³ *TAC* (2002) para 4.

¹²⁵⁴ *TAC* (2002) para 19.

at a limited number of research and training sites throughout South Africa.¹²⁵⁵

The Constitutional Court confirmed that the state had acted in an unreasonable manner in confining the availability of Nevirapine to the aforementioned pilot sites.¹²⁵⁶ Thus, the Constitutional Court issued a mandatory order in the *TAC* matter (to extend the availability of Nevirapine beyond the test sites as well as to expand testing and counselling services) but elected not to retain an element of supervisory jurisdiction.¹²⁵⁷

Bilchitz believes that the enquiry mounted by the Court should have sought to ascertain the reasonableness of the measures adopted by the state to effect progressive realisation of the rights detailed in sections 26(1) and 27(1).¹²⁵⁸ This would in fact entail the Court pronouncing on the content of the rights detailed in section 26(1) and 27(1).¹²⁵⁹ However, the Constitutional Court did not provide a description of what the right to healthcare in fact includes.¹²⁶⁰ It is of paramount importance to provide content to socio-economic rights so that there is a clear benchmark against which to assess the measures adopted by the state to progressively realise the right in question.¹²⁶¹ Furthermore, the wording of the *TAC* judgment is indicative of the Constitutional Court adopting the point of view that the state had failed to discharge its positive obligations by not providing vital medication to patients.¹²⁶² Thus, Bilchitz rightfully contends that the Constitutional Court should have

¹²⁵⁵ *TAC* (2002) para 10.

¹²⁵⁶ *TAC* (2002) para 35.

¹²⁵⁷ *TAC* (2002) para 45.

¹²⁵⁸ Bilchitz D *Poverty and Fundamental Rights* (2007) 156. Please see *TAC* (2002) para 41.

¹²⁵⁹ Bilchitz D *Poverty and Fundamental Rights* (2007) 156.

¹²⁶⁰ Bilchitz D *Poverty and Fundamental Rights* (2007) 156.

¹²⁶¹ Bilchitz D *Poverty and Fundamental Rights* (2007) 156.

¹²⁶² Bilchitz D *Poverty and Fundamental Rights* (2007) 158. Please see Brand D 'What Are Socio-Economic Rights For?' (2003) 46.

sought to provide some content to the right to healthcare to the extent permitted by the facts of the case.¹²⁶³

Furthermore, the Constitutional Court could counter concerns about paying undue deference to the other branches of government if it provided clear guidelines as to how the appropriateness of the policies of the state were to be assessed.¹²⁶⁴ It follows that it could do so by providing determinate content of the rights in question rather than relying on the opaque notion of reasonableness.¹²⁶⁵ The flawed nature of the court order in *TAC* was in part due to the focus of the Constitutional Court on assessing the reasonableness of the conduct of the state rather than a clear focus on the lives of babies that were at stake.¹²⁶⁶ The Court had clear evidence that HIV could be transmitted by mothers breastfeeding their babies¹²⁶⁷ yet failed to order the state to include the provision of infant formula feed¹²⁶⁸ as part of its comprehensive treatment strategy.¹²⁶⁹ Bilchitz highlighted that this placed numerous babies at risk of contracting a life-threatening disease.¹²⁷⁰

Furthermore, the Constitutional Court elected not to retain supervisory jurisdiction in *TAC* (as previously described) which is difficult to understand in light of the obstructive approach adopted by the state in distributing ARVs to vulnerable people.¹²⁷¹ Thus, it is fair comment that this was an especially inopportune moment for the Constitutional Court to refer to the *bona fides*¹²⁷² of the state.¹²⁷³ In this regard the Court had stated that ‘...the government has always respected and executed the orders of the Constitutional Court. There is no reason to believe that it

¹²⁶³ Bilchitz D *Poverty and Fundamental Rights* (2007) 158. Please see Brand D ‘What Are Socio-Economic Rights For?’ (2003) 46.

¹²⁶⁴ Bilchitz D *Poverty and Fundamental Rights* (2007) 162.

¹²⁶⁵ Bilchitz D *Poverty and Fundamental Rights* (2007) 162.

¹²⁶⁶ Bilchitz D *Poverty and Fundamental Rights* (2007) 163.

¹²⁶⁷ *TAC* (2002) para 38.

¹²⁶⁸ *TAC* (2002) para 38. Please see discussion below regarding the provision of infant formula feed by Heywood and Liebenberg.

¹²⁶⁹ Bilchitz D *Poverty and Fundamental Rights* (2007) 163.

¹²⁷⁰ Bilchitz D *Poverty and Fundamental Rights* (2007) 163.

¹²⁷¹ Bilchitz D *Poverty and Fundamental Rights* (2007) 163.

¹²⁷² *TAC* (2002) para 39.

¹²⁷³ Bilchitz D *Poverty and Fundamental Rights* (2007) 163.

will not do so in the present case'.¹²⁷⁴ Furthermore, there was clear evidence in the months following the issuing of the court order that a number of provinces had not made any real effort to adhere to the court order.¹²⁷⁵ Limpopo and Mpumalanga were identified as failing to cater for the increased availability of Nevirapine despite having the necessary capacity.¹²⁷⁶

Bilchitz believes that the Constitutional Court should have focussed its attention on developing the determinate content of the right (as well as maximising the effectiveness and reach of the subsequent order) in line with its mandate as the guardian of the Constitution rather than seeking to display excessive deference to the state.¹²⁷⁷ Also, there is grave concern about the manner in which the state elected to implement the orders of the Constitutional Court in the absence of supervisory jurisdiction.¹²⁷⁸ It should be noted that the Executive will only be in a position to appreciate what is expected of them if the judgment provides the necessary guidance regarding the content of the rights in question as well as the benchmarking of the objectives to be achieved.¹²⁷⁹

Nonetheless, Heywood believes that the decision handed down by the Constitutional Court in *TAC* serves to 'validate' the Constitution and provides the necessary assurance 'to those who still suffer marginalisation and deprivation' that the Constitution can bring about material changes and change their lives for the better.¹²⁸⁰ Heywood states that the Treatment Action Campaign was invigorated by the recognition and acknowledgement by the Constitutional Court.¹²⁸¹ This serves to highlight the obligation of the state to provide for the

¹²⁷⁴ *TAC* (2002) para 39.

¹²⁷⁵ Bilchitz D *Poverty and Fundamental Rights* (2007) 163.

¹²⁷⁶ Bilchitz D *Poverty and Fundamental Rights* (2007) 163.

¹²⁷⁷ Bilchitz D *Poverty and Fundamental Rights* (2007) 163.

¹²⁷⁸ Bilchitz D *Poverty and Fundamental Rights* (2007) 163.

¹²⁷⁹ Bilchitz D *Poverty and Fundamental Rights* (2007) 164.

¹²⁸⁰ Heywood M 'Preventing mother-to-child HIV transmission in South Africa: Background, strategies and outcomes of the Treatment Action Case against the Minister of Health' (2003) 19 *SAJHR* 279 (hereafter Preventing mother-to-child HIV transmission).

¹²⁸¹ Heywood M 'Preventing mother-to-child HIV transmission' (2003) *SAJHR* 279.

dissemination of information to the public through engaging with its critical stakeholders (e.g. the public, NGOS and Chapter 9 Institutions such as the SAHRC) on an ongoing basis.¹²⁸²

Heywood refers to the opposition mounted by the state with the latter noting that breast feeding carried the risk of HIV transmission even for those children who had avoided infection through treatment with Nevirapine.¹²⁸³ The state in effect argued that the persistent nature of the aforementioned risk (in the future) was reason enough to deny the Nevirapine therapy to women and children at this (earlier) point in time even though the benefits of Nevirapine were irrefutable.¹²⁸⁴ However, the Constitutional Court declined to make an order relating to the supply of formula milk (as previously indicated).¹²⁸⁵ Furthermore, the Constitutional Court believed that it raised 'complex issues'¹²⁸⁶ and that there was insufficient evidence to defend an order that formula feed 'be made available by the government on request and without charge in every case.'¹²⁸⁷ Liebenberg notes that the complexities referred to include the risks to the infant using formula milk where the mother does not have access to clean water or the ability to bottle feed safely because of her personal circumstances.¹²⁸⁸

In conclusion, Liebenberg believed that the addition of the requirement of transparency (alongside the requirement of reasonableness) in *TAC* was to be welcomed.¹²⁸⁹ However, a programme could only be 'implemented optimally' if all stakeholders were suitably informed.¹²⁹⁰ This served to demonstrate the lack of accountability and political will on the part of the state to prioritise the needs of a specific and extremely vulnerable group. It is submitted that public officials who embrace the communal obligations focus of ubuntu will recognise the pressing need

¹²⁸² Please see Section 3.4.1.

¹²⁸³ Heywood M 'Preventing mother-to-child HIV transmission' (2003) *SAJHR* 296.

¹²⁸⁴ Heywood M 'Preventing mother-to-child HIV transmission' (2003) *SAJHR* 296.

¹²⁸⁵ Heywood M 'Preventing mother-to-child HIV transmission' (2003) *SAJHR* 296.

¹²⁸⁶ *TAC* (2002) para 38.

¹²⁸⁷ Liebenberg S 'Interpretation of socio-economic rights' (2003) (Section 33.5) 11.

¹²⁸⁸ Liebenberg S 'Interpretation of socio-economic rights' (2003) (Section 33.5) 11.

¹²⁸⁹ Liebenberg S 'Interpretation of socio-economic rights' (2003) (Section 33.5) 11.

¹²⁹⁰ Liebenberg S 'Interpretation of socio-economic rights' (2003) (Section 33.5) 11.

to come to the aid of vulnerable groups (in this instance HIV positive mothers and their children) in order to shape a just and caring nation in which all people are treated as possessing equal worth. Furthermore, it is only when vulnerable groups are freed from threats to their survival that we can speak (with any sort of authority) about forging a nation-state which is premised on social solidarity ideals.

3.6.5 An overarching analysis of the socio-economic rights jurisprudence (*Soobramoney*, *Grootboom* and *TAC*) in the Constitutional Court

The *Grootboom* case was ultimately about a state programme which did not cater for the urgent short term needs (i.e. basic shelter from the elements) of vulnerable people.¹²⁹¹ Thus, it is more appropriately defined as an ‘inadequate provision’ by the state rather than an ‘unreasonable exclusion’ by the state.¹²⁹² Similarly, the *TAC* case was not ultimately characterised as a discriminatory act by the state but rather that the state did not believe that it had an obligation to combat mother to child transmission (‘MTCT’) of HIV in South Africa.¹²⁹³

There are significant drawbacks in the Constitutional Court’s adoption of the reasonableness approach regarding the interpretation and subsequent implementation of socio-economic rights.¹²⁹⁴ Reasonableness does not possess the content required to deliberate on cases concerning socio-economic rights and this inevitably leads to decisions that are not properly justified.¹²⁹⁵ The focus in the constitutional enquiry is reduced to a careful balancing of various factors rather than an unwavering focus on the urgent interests of vulnerable people.¹²⁹⁶ The underlying rationale offered by the Constitutional Court

¹²⁹¹ Bilchitz D *Poverty and Fundamental Rights* (2007) 168.

¹²⁹² Bilchitz D *Poverty and Fundamental Rights* (2007) 168.

¹²⁹³ Bilchitz D *Poverty and Fundamental Rights* (2007) 168.

¹²⁹⁴ Bilchitz D *Poverty and Fundamental Rights* (2007) 176.

Please see *Soobramoney* (1998) para 29 and *Grootboom* (2000) para 41.

Please also see *TAC* (2002) para 36.

¹²⁹⁵ Bilchitz D *Poverty and Fundamental Rights* (2007) 176.

¹²⁹⁶ Bilchitz D *Poverty and Fundamental Rights* (2007) 176.

(for the content ascribed to reasonableness) is opaque.¹²⁹⁷ Furthermore, a critical flaw in the reasonableness approach is that there is an absence of clarity as well as certainty in relation to the obligations owed by the state to vulnerable groups.¹²⁹⁸ Consequently, other branches of government are not provided with definitive guidance as to the nature and extent of the duties owed in giving effect to socio-economic rights.¹²⁹⁹ In addition, it undermines the manner in which judges in lower courts deliberate in cases concerned with the same subject matter.¹³⁰⁰

The concept of reasonableness does not offer a suitable platform from which to ascertain whether a specific set of circumstances warrants an intervention by the Constitutional Court to scrutinise the decisions of other branches of the state.¹³⁰¹ Also, there is the likelihood of errors creeping into court deliberations.¹³⁰² This is due to the fact that vagueness is inherent when one employs a reasonableness approach to conduct normative tasks that are conflated.¹³⁰³ This is especially true where the Constitutional Court has highlighted numerous enquiries which could ostensibly be dealt with under the auspices of the reasonableness approach.¹³⁰⁴

It is submitted that the insight offered by Brand below captures my concern with the flawed approach of the Court in endorsing a reasonableness approach to evaluate the conduct of the state in progressively realising socio-economic rights as enshrined in the Constitution. The manner in which Brand insists upon the suffering of vulnerable groups being placed front and centre (rather than being cast to the periphery in favour of a misplaced focus on the reasonableness of state conduct) is fully endorsed in this thesis. The aforementioned

¹²⁹⁷ Bilchitz D *Poverty and Fundamental Rights* (2007) 176.

¹²⁹⁸ Bilchitz D *Poverty and Fundamental Rights* (2007) 176.

¹²⁹⁹ Bilchitz D *Poverty and Fundamental Rights* (2007) 176.

¹³⁰⁰ Bilchitz D *Poverty and Fundamental Rights* (2007) 176.

¹³⁰¹ Bilchitz D *Poverty and Fundamental Rights* (2007) 176. Please see Brand D 'What Are Socio-Economic Rights For?' (2003) 39 - 40.

¹³⁰² Bilchitz D *Poverty and Fundamental Rights* (2007) 176.

¹³⁰³ Bilchitz D *Poverty and Fundamental Rights* (2007) 176.

¹³⁰⁴ Bilchitz D *Poverty and Fundamental Rights* (2007) 176.

endorsement of Brand's approach is predicated on the state taking a matter of fact approach in ascertaining the actual suffering endured by vulnerable groups and taking targeted action in the short to medium term to put an end to that same suffering.

In this regard Brand believes that the Constitutional Court (in adjudicating a case involving socio-economic rights) is likely to be satisfied by the state demonstrating that it 'will act in a manner consistent with good governance, and only that' in tackling poverty and suffering.¹³⁰⁵ However, the Constitutional Court is obliged to ascertain whether the state is 'pursuing the correct, constitutionally prescribed goal with its policies'.¹³⁰⁶ Consequently, the Constitutional Court is duty-bound to ascertain to a fair degree the nature and extent of the aforementioned goal and this in turn obliges the Court to 'describe these rights substantively and to determine what it is that the Constitution requires government to work towards'.¹³⁰⁷ Thus, Brand refers with approval to the work of Bilchitz in highlighting the need for the Constitutional Court to fix the substantive benchmark that the state has to attain (as a reflection of the 'end goals') while the state is empowered to exercise its discretion (within reason) to choose the manner in which to achieve those same end goals.¹³⁰⁸

Brand is justifiably critical of the approach of the Constitutional Court in *Soobramoney* as the court elected to focus on the limits imposed by sections 26(2) and 27(2) rather than the tangible substance of the rights themselves.¹³⁰⁹ Brand highlights a similar approach on the part of the Constitutional Court in *Grootboom* in which the Court elects to focus primarily on the outer limits of the obligations borne by the state (regarding the provision of access to housing)¹³¹⁰ rather than focusing

¹³⁰⁵ Brand D 'What are socio-economic rights for?' (2003) 37.

¹³⁰⁶ Brand D 'What are socio-economic rights for?' (2003) 37.

¹³⁰⁷ Brand D 'What are socio-economic rights for?' (2003) 44.

¹³⁰⁸ Brand D 'What are socio-economic rights for?' (2003) 44.

¹³⁰⁹ Brand D 'What are socio-economic rights for?' (2003) 45.

¹³¹⁰ *Grootboom* (2000) para 41.

on the specific, substantive content attributable to that same right.¹³¹¹ The Constitutional Court highlighted the supposed challenges in adequately defining the minimum core content of the rights involved (in both *Soobramoney* and *TAC*) as a seemingly key concern in rejecting the minimum core notion.¹³¹²

However, the Constitutional Court does not enquire whether the policies of the state are likely to achieve the progressive realisation of the rights in question.¹³¹³ The reality is that the Court is not in a position to do so as it has never adequately defined the rights against which the reasonableness of the state policies could be measured.¹³¹⁴ Thus, it is my submission that the reasonableness approach of the Constitutional Court is deeply flawed as one cannot ascertain whether the state has discharged its duties (in giving effect to critical subsistence rights) if the standard against which the conduct of the state is to be measured does not offer the necessary clarity as to the core content of those same socio-economic rights. It is further submitted that the aforementioned view is in keeping with the illuminating academic contributions by Bilchitz and Brand as to the defective nature of the reasonableness approach and the need for the Court to adopt a minimum core obligation approach – this will facilitate and strengthen the ability of the state to make a telling contribution in realising the critical subsistence rights of vulnerable groups.

In addition, Brand rightfully believes that the *Soobramoney* judgment could plausibly be viewed as a ‘decision not to decide’.¹³¹⁵ In this regard the Constitutional Court had endorsed the supposedly neutral legal principles of honesty as well as rationality¹³¹⁶ and the manner in which it contrasted this with the ‘difficult decisions to be taken at the political level

¹³¹¹ Brand D ‘What are socio-economic rights for?’ (2003) 45.

¹³¹² Brand D ‘What are socio-economic rights for?’ (2003) 47.

¹³¹³ Brand D ‘What are socio-economic rights for?’ (2003) 49.

¹³¹⁴ Brand D ‘What are socio-economic rights for?’ (2003) 49.

¹³¹⁵ Brand D ‘What are socio-economic rights for?’ (2003) 49.

¹³¹⁶ *Soobramoney* (1998) para 29.

to fixing the health budget, and at the functional level in deciding upon the priorities to be met'.¹³¹⁷ However, Brand is correct in stating that the Constitutional Court did in fact decide the fate of Mr. Soobramoney in an emphatic fashion (in light of his untimely passing shortly after the judgment was delivered as previously described).¹³¹⁸ In addition, the Constitutional Court in *Grootboom* sought to emphasise that it made its decision on the basis of objective legal reasoning rather than focusing on policy deliberations.¹³¹⁹ Furthermore, the Constitutional Court sought to deny any political considerations in its decision-making in *TAC*.¹³²⁰ However, the overriding concern raised by Brand is not so much that the Constitutional Court sought to avoid its political responsibility - he believes the Court cannot escape the aforementioned responsibility in any event.¹³²¹ Brand's concerns are instead centred on the political philosophy employed by the Constitutional Court in arriving at its decisions.¹³²² He believes that the aforementioned philosophy is kept hidden and is consequently not offered up for scrutiny nor subjected to the inevitable debate as to its suitability for its intended purpose.¹³²³

In *Grootboom* the Court did not compel the state to revise and/or augment its housing programme so as to pass constitutional muster.¹³²⁴ However, the Court issued a mandatory order in *TAC* which ensured that the Court retained 'jurisdiction over the matter if there is non-compliance with the order' as previously described.¹³²⁵ Thus, the applicants in the matter could approach the Court in the event that the relevant representatives of the state did not adhere to the terms of the court order.¹³²⁶ It should be noted that the Constitutional Court elected not to

¹³¹⁷ *Soobramoney* (1998) para 29.

¹³¹⁸ Brand D 'What are socio-economic rights for?' (2003) 55.

¹³¹⁹ *Grootboom* (2000) para 41.

¹³²⁰ *TAC* (2002) paras 20 - 21.

¹³²¹ Brand D 'What are socio-economic rights for?' (2003) 55.

¹³²² Brand D 'What are socio-economic rights for?' (2003) 55.

¹³²³ Brand D 'What are socio-economic rights for?' (2003) 55.

¹³²⁴ *Grootboom* (2000) para 69.

¹³²⁵ Pillay K 'Implications for the enforcement of socio-economic rights' (2003) *Law, Democracy and Development* 275.

¹³²⁶ Pillay K 'Implications for the enforcement of socio-economic rights' (2003) *Law, Democracy and Development* 275.

retain jurisdiction in the *TAC* matter.¹³²⁷ Pillay emphasises her concern with the path chosen by the Constitutional Court in *TAC* in light of the fact that the applicants '(whose attorneys of record were the same attorneys who represented the *amici curiae* in the *Grootboom* matter) drew the attention of the Court in their argument before it to the difficulties experienced in implementing the *Grootboom* order'.¹³²⁸ Consequently, a failure on the part of the Constitutional Court to craft effective orders (which compel the state to swiftly undo/revise unconstitutional practices) could result in the grim reality where the Constitutional Court fails to discharge its obligation to respect, protect, promote and fulfil the rights contained in the Constitution.

De Vos believes that the Constitutional Court refrained from engaging with the challenging issues brought about by the inclusion of socio-economic rights in *Soobramoney* and instead sought to emphasise that it would be 'slow to interfere'¹³²⁹ with rational decisions adopted in good faith by the relevant political institutions and medical authorities.¹³³⁰ However, the Constitutional Court in *Grootboom* did not only focus on the rationality of state conduct (as in *Soobramoney*) but sought to emphasise that the state was required to act reasonably in discharging its constitutional obligations relating to socio-economic rights (as previously outlined).¹³³¹ Thus, De Vos opines that the aforementioned *Soobramoney* and *Grootboom* judgments are remarkably consistent if one embraces 'the Constitutional Court's transformative vision of the Constitution and its attendant acceptance of the substantive idea of equality'.¹³³² He consequently believes that the *Soobramoney* and *Grootboom* judgments have a common thread in that they demonstrate the Constitutional Court's understanding of the Bill of Rights (with

¹³²⁷ *TAC* (2002) para 129.

¹³²⁸ Pillay K 'Implications for the enforcement of socio-economic rights' (2003) *Law, Democracy and Development* 276.

¹³²⁹ *Soobramoney* (1998) para 29.

¹³³⁰ De Vos P 'Grootboom' *SAJHR* (2001) 259.

¹³³¹ De Vos P 'Grootboom' *SAJHR* (2001) 259.

¹³³² De Vos P 'Grootboom' *SAJHR* (2001) 259.

specific reference to the equality clause and socio-economic rights provisions).¹³³³ It is for this very reason that the Constitution should be viewed as a transformative document which seeks to dismantle the pervasive social and economic inequalities on display in our society.¹³³⁴

De Vos notes that the applicant in *Soobramoney* had sought an order compelling the state to provide him with expensive dialysis treatment while there were desperately poor people in that same province that had extremely limited access to even primary health care treatment.¹³³⁵ Furthermore, De Vos contrasted the situation of the applicant in *Soobramoney* with the desperate situation of the homeless applicants in *Grootboom* that had approached the Constitutional Court because the state had essentially ignored their plight and persisted in giving effect to a housing programme which failed to address those in desperate need.¹³³⁶ Thus, De Vos believes that it was inevitable that the Constitutional Court would reject the claim in *Soobramoney* whilst coming to the aid of the *Grootboom* community due to the reliance placed on a transformative vision of the Constitution by the Constitutional Court.¹³³⁷ The aforementioned vision is viewed as depending upon 'a contextual approach to the interpretation of the Constitution and the Bill of Rights in particular'.¹³³⁸

It is important to acknowledge (as well as embrace) the persuasive reasoning employed by De Vos in highlighting the relative privilege of Mr Soobramoney in comparison to the homeless people in the *Grootboom* matter and the (supposed) inevitability of the decision(s) reached by the Constitutional Court. However, the Constitutional Court should have (at the very least) compelled the state to fully account (with regards to its available resources) in the *Soobramoney* matter in light of the urgency and importance of the constitutionally protected right that was placed in

¹³³³ De Vos P 'Grootboom' *SAJHR* (2001) 259.

¹³³⁴ De Vos P 'Grootboom' *SAJHR* (2001) 259.

¹³³⁵ De Vos P 'Grootboom' *SAJHR* (2001) 260. Please see *Soobramoney* (1998) para 7.

¹³³⁶ De Vos P 'Grootboom' *SAJHR* (2001) 260. Please see *Grootboom* (2000) para 4.

¹³³⁷ De Vos P 'Grootboom' *SAJHR* (2001) 260.

¹³³⁸ De Vos P 'Grootboom' *SAJHR* (2001) 260.

jeopardy (i.e. the right to life). Consequently, De Vos believes that embracing the transformative nature of the Constitution will facilitate an understanding of how closely the right to equality and socio-economic rights are related and that the *Soobramoney* and *Grootboom* decisions are as much about securing a 'specific contextual form of equality' as giving effect to specific socio-economic rights.¹³³⁹

It is submitted that the insights offered by De Vos with regards to a 'specific contextual form of equality' are critical in developing a better understanding of the philosophical and theoretical underpinnings which inform the decision-making of the Constitutional Court. This in turn serves as a fitting backdrop for the discussion by Roux below as related to the manner in which the separation of powers doctrine has in fact shaped the decision-making approach of the Constitutional Court.

In conclusion, Kende believes that South African scholars are for the most part wrong in being critical of the decisions reached by the Constitutional Court in respect of the Court not defining the nature of the rights in question nor enforcing realisation of the rights.¹³⁴⁰ He distances himself from the belief that the Court's decisions will permit the state to delay the implementation of the rights as well as postpone the dismantling of the legacy of apartheid.¹³⁴¹ Kende takes the view that the ruling party (in enjoying a dominant majority in Parliament) and its President are better placed to bring about social transformation over time.¹³⁴² I do not agree with Kende's insights as he fails to appreciate the extent of the transformative role envisaged for the Constitution (and by implication the Constitutional Court) and the manner in which the realisation of civil, political and socio-economic rights is aimed at dismantling the legacy of apartheid. Thus, the Constitutional Court must hold the state accountable to progressively realise the rights enshrined

¹³³⁹ De Vos P 'Grootboom' *SAJHR* (2001) 263.

¹³⁴⁰ Kende MS 'A response to critics' *Connecticut Journal of International Law* (2004) 617.

¹³⁴¹ Kende MS 'A response to critics' *Connecticut Journal of International Law* (2004) 618.

¹³⁴² Kende MS 'A response to critics' *Connecticut Journal of International Law* (2004) 618.

in the Constitution as a means to prioritise the critical needs of vulnerable groups and forge a sustainable version of social solidarity.

However, it is fair comment that the representatives of the state (i.e. the public officials) should supplement the efforts of the Constitutional Court by making every effort to come to the aid of vulnerable groups. This can be achieved through public officials devising policies and programmes with benchmarked sectoral targets so as to prioritise the needs of vulnerable groups through giving effect to constitutionally guaranteed subsistence rights. This in turn will serve as an embodiment of the communal obligations' focus of ubuntu. This serves to emphasise that ubuntu (understood as giving effect to the primacy of communal obligations) can indeed mesh with an individual human rights regime in creating a just and caring society in which social solidarity ideals (understood as a celebration of our shared humanity despite any perceived differences) will take pride of place.

Furthermore, it is necessary to emphasise that the accountability of public officials (in recognising that they are duty-bound to give effect to socio-economic rights) is of crucial importance in shaping an environment in which ubuntu can give rise to a constant stream of humanising acts (on the part of public officials) to ease the plight of vulnerable groups and in so doing strive to forge a just and caring nation-state.

3.6.5.1 An analysis of the Separation of Powers Doctrine with specific reference to the role of the Constitutional Court

The Constitutional Court is the key institution in evaluating the conduct of the representatives of the state (i.e. public officials) in progressively realising the socio-economic rights as enshrined in the Constitution. It follows that one has to have an intimate understanding of the manner in which Court makes its decisions. In this regard the contribution by Roux (in relation to the separation of powers doctrine from the perspective of the Court) is vital in shaping an enhanced understanding of the decision-

making of the Court so as to be in a position to better understand how to progressively advance the subsistence rights of vulnerable groups.

In this regard Roux provides definitive insight regarding the separation of powers doctrine from the vantage point of the Constitutional Court.¹³⁴³ He offers an illuminating account as to the obstacles that the Court has to continuously negotiate so as to safeguard its institutional security whilst striving to deliver sound legal decisions as well as bolster its public support base.¹³⁴⁴ Roux aims to provide theoretical insights into the relationship underlying legal legitimacy, public support and institutional security as a means to evaluate the record of the Constitutional Court between 1995 and 2006.¹³⁴⁵ The legitimacy of judicial review is defined as the ability of the court to hand down decisions shaped by reasoning which is deemed acceptable to the legal community in which the Constitutional Court finds itself.¹³⁴⁶ Public support is defined as the level of confidence which the population as a whole has in the Constitutional Court while institutional security is viewed as the ability of the Constitutional Court to stave off threatened or actual attacks on its independence.¹³⁴⁷

It is noted that a single political party has dominated the political landscape during the aforementioned period.¹³⁴⁸ Consequently, Roux states, with reference to his theory, that the Constitutional Court could have focused its attention on its relationship with the political branch

¹³⁴³ Roux T 'Principle and pragmatism' *International Journal of Constitutional Law* (2009) 106.

¹³⁴⁴ Roux T 'Principle and pragmatism' *International Journal of Constitutional Law* (2009) 106. Please see *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* 2000 (2) SA 1 (CC) para 66.

¹³⁴⁵ Roux T 'Principle and pragmatism' *International Journal of Constitutional Law* (2009) 106.

¹³⁴⁶ Roux T 'Principle and pragmatism' *International Journal of Constitutional Law* (2009) 108.

¹³⁴⁷ Roux T 'Principle and pragmatism' *International Journal of Constitutional Law* (2009) 108.

¹³⁴⁸ Roux T 'Principle and pragmatism' *International Journal of Constitutional Law* (2009) 108.

while essentially ignoring its lack of public support.¹³⁴⁹ Thus, Roux has an expectation that legal legitimacy (as defined by principled decision-making) would be sacrificed in certain instances as a means to safeguard institutional security.¹³⁵⁰ This was indeed the case (in the abovementioned time period) as the Constitutional Court has utilised the separation of powers doctrine to circumvent going head to head with the political branch and also embraced a number of 'context-sensitive review standards' in handling more routine cases.¹³⁵¹

It is believed that the separation of powers 'is one of the cornerstones of South Africa's constitutional democracy because it regulates the exercise of public power'.¹³⁵² However, Pillay is correct in pointing out that the aforementioned doctrine does not detract from the duties borne by the Court to craft effective remedies in giving effect to key rights.¹³⁵³ Consequently, judges are expected to embrace their duties as protectors of the Constitution while being mindful of the need to display appropriate deference to the Legislature and Executive in developing policy and setting budgets.¹³⁵⁴

Roux believes that a combination of pragmatism and principled decision-making is likely to be the best way for a Constitutional Court in a fledgling democracy to bolster its legal legitimacy while safeguarding its institutional security.¹³⁵⁵ Roux further believes that the Constitutional Court did just that (in employing a combination of pragmatism and

¹³⁴⁹ Roux T 'Principle and pragmatism' *International Journal of Constitutional Law* (2009) 108.

¹³⁵⁰ Roux T 'Principle and pragmatism' *International Journal of Constitutional Law* (2009) 108.

¹³⁵¹ Roux T 'Principle and pragmatism' *International Journal of Constitutional Law* (2009) 108.

¹³⁵² Pillay K 'Implications for the enforcement of socio-economic rights' (2003) *Law, Democracy and Development* 259.

¹³⁵³ Pillay K 'Implications for the enforcement of socio-economic rights' (2003) *Law, Democracy and Development* 259.

¹³⁵⁴ Pillay K 'Implications for the enforcement of socio-economic rights' (2003) *Law, Democracy and Development* 259.

¹³⁵⁵ Roux T 'Principle and pragmatism' *International Journal of Constitutional Law* (2009) 108.

principle) in the aforementioned time period under review.¹³⁵⁶ It should be noted that legal legitimacy, public support and institutional security are interrelated but not in an elementary or straightforward manner.¹³⁵⁷ The exact nature of the relationship between the three aforementioned concepts will change depending on the country under evaluation.¹³⁵⁸

However, a workable hypothesis is proposed in which there are two basic rules that define the nature of the relationship between the three factors.¹³⁵⁹ The first rule provides that it would be pointless for a Constitutional Court in a fledgling democracy to strive for legal legitimacy if the pursuit of that same goal served to sacrifice institutional security.¹³⁶⁰ Unless the price demanded for that same institutional security was set too high (i.e. if the Constitutional Court was forced to hand down a decision which would obliterate its reputation as a judicial institution that makes legitimate legal decisions).¹³⁶¹ The second basic rule concerning the aforementioned three factors is that public support normally leads to institutional security.¹³⁶² However, the situation in South Africa deviates from the second basic rule as the dominance of the ruling party serves as a buffer against the lack of public support for the Constitutional Court.¹³⁶³ Thus, the Constitutional Court is lauded for the substantive depth of its judgments and is perceived as being

¹³⁵⁶ Roux T 'Principle and pragmatism' *International Journal of Constitutional Law* (2009) 108.

¹³⁵⁷ Roux T 'Principle and pragmatism' *International Journal of Constitutional Law* (2009) 108.

¹³⁵⁸ Roux T 'Principle and pragmatism' *International Journal of Constitutional Law* (2009) 110.

¹³⁵⁹ Roux T 'Principle and pragmatism' *International Journal of Constitutional Law* (2009) 110.

¹³⁶⁰ Roux T 'Principle and pragmatism' *International Journal of Constitutional Law* (2009) 110.

¹³⁶¹ Roux T 'Principle and pragmatism' *International Journal of Constitutional Law* (2009) 110.

¹³⁶² Roux T 'Principle and *pragmatism*' *International Journal of Constitutional Law* (2009) 110.

¹³⁶³ Roux T 'Principle and pragmatism' *International Journal of Constitutional Law* (2009) 111.

relatively secure from political attacks even though it has limited public support.¹³⁶⁴

Roux refers to a Constitutional Court in a new democracy shaping its jurisprudence in run of the mill cases so as to forge greater discretion for itself by devising a context-sensitive review standard (as per the path chosen by the Constitutional Court in South Africa) which strengthened its ability to consider future cases 'on their particular facts'.¹³⁶⁵

It should be noted that the notion of reasonableness makes allowance for the judicial review of decisions whilst remaining mindful that there is a 'margin of appreciation' which the decision-making body retains as a rule.¹³⁶⁶ The aforementioned 'margin of appreciation' is necessary in giving effect to the separation of powers doctrine.¹³⁶⁷ This in turn galvanises the idea that the institution with the greatest competence will have the privilege of choosing between measures which fall within the range of that which can be construed as reasonable.¹³⁶⁸ However, it should be noted that 'reasonable' qualifies the word 'measures' in the socio-economic provisions in the Constitution rather than the right itself.¹³⁶⁹ Thus, the right in question offers more than a firm expectation that the state acts in a reasonable manner in giving effect to socio-economic rights in society.¹³⁷⁰ Bilchitz offers a critical insight in emphasising that deference is not owed to the state (when articulating the nature and content of the right to access adequate housing) but rather to provide the state with a measure of discretion (i.e. a margin of

¹³⁶⁴ Roux T 'Principle and pragmatism' *International Journal of Constitutional Law* (2009) 112. Please see *Makwanyane* (1995) paras 87 - 88.

¹³⁶⁵ Roux T 'Principle and pragmatism' *International Journal of Constitutional Law* (2009) 117.

¹³⁶⁶ Bilchitz D 'Giving socio-economic rights teeth' *South African Law Journal* (2002) 495. Please see sections 167(4), 167 (5), 169(a) and 172 of the Constitution of the Republic of South Africa, 1996.

¹³⁶⁷ Bilchitz D 'Giving socio-economic rights teeth' *South African Law Journal* (2002) 495.

¹³⁶⁸ Bilchitz D 'Giving socio-economic rights teeth' *South African Law Journal* (2002) 495.

¹³⁶⁹ Bilchitz D 'Giving socio-economic rights teeth' *South African Law Journal* (2002) 496.

¹³⁷⁰ Bilchitz D 'Giving socio-economic rights teeth' *South African Law Journal* (2002) 496.

appreciation) in choosing the manner in which it will discharge its obligation.¹³⁷¹ Consequently, it should be clear that providing content to an obligation borne by the state is separate from the notion of reasonableness.¹³⁷²

Roux believes that the common thread running through *Makwanyane* and *TAC* was the manner in which the Constitutional Court was able to exploit the political context in *Makwanyane* (i.e. strong political support and limited public support) versus *TAC* (i.e. overwhelming public support and vigorous political opposition) to issue principled judgments and in the process bolster its institutional legitimacy.¹³⁷³

Kende is critical of scholars who advocated for the Constitutional Court to deliberate on questions which did not require resolution in the specific circumstances of the case.¹³⁷⁴ Kende calls for careful consideration in light of the ground-breaking nature of the issues and that if 'there is concern over both separation of powers and judicial competency, it makes sense for the Constitutional Court to act cautiously'.¹³⁷⁵ In addition, he believes that it is readily apparent that the decisions reached by the Constitutional Court in *Grootboom* and *TAC* 'are major human rights victories which have improved the situation of many'.¹³⁷⁶ However, Kende does concede that the 'pragmatic approach' employed by the Constitutional Court only provides the state with paltry guidance and that the Constitutional Court should have retained supervisory jurisdiction as part of the remedy in the relevant cases.¹³⁷⁷

¹³⁷¹ Bilchitz D 'Giving socio-economic rights teeth' *South African Law Journal* (2002) 496.

¹³⁷² Bilchitz D 'Giving socio-economic rights teeth' *South African Law Journal* (2002) 496.

¹³⁷³ Roux T 'Principle and pragmatism' *International Journal of Constitutional Law* (2009) 125.

¹³⁷⁴ Kende MS 'A response to critics' *Connecticut Journal of International Law* (2004) 623.

¹³⁷⁵ Kende MS 'A response to critics' *Connecticut Journal of International Law* (2004) 624.

¹³⁷⁶ Kende MS 'A response to critics' *Connecticut Journal of International Law* (2004) 624.

¹³⁷⁷ Kende MS 'A response to critics' *Connecticut Journal of International Law* (2004) 624.

However, Scott and Alston believe it is critical that the courts do not demonstrate an 'undue willingness to concede this constitutional terrain to the government in the face of general arguments that the government has some plan in place and that it is making agonising, tragic choices'.¹³⁷⁸ Furthermore, it is easy to be overwhelmed by the sheer magnitude of the challenges that have to be faced unflinchingly by South African constitutionalism in relation to new institutional paradigms as well as the marked deprivation endured by a disturbingly large amount of people.¹³⁷⁹ The aforementioned insight offered by Scott and Alston is hard to fault in that the courts have been entrusted, through constitutional rights adjudication, to give effect to the values of dignity, freedom and equality which encapsulate not only the Bill of Rights but the entire Constitution.¹³⁸⁰

The manner in which the Constitutional Court dealt with *Makwanyane* and *TAC* should be contrasted with cases in which the Constitutional Court is viewed as compromising on principle (in light of a less than favourable political environment) and in so doing circumventing confrontation with the political branch.¹³⁸¹ Roux believes that the cases decided in this manner by the Constitutional Court are but a tiny proportion of the total number of cases heard.¹³⁸² However, he highlights the need for these decisions by the Constitutional Court to be recognised as pragmatic compromises rather than mistakes for two specific reasons.¹³⁸³ The first reason being that a judge writing for the minority (Justice O'Regan) set out the principled position which the majority was

¹³⁷⁸ Scott C & Alston P 'Adjudicating constitutional priorities' *SAJHR* (2000) 268.

¹³⁷⁹ Scott C & Alston P 'Adjudicating constitutional priorities' *SAJHR* (2000) 268. Please see *Soobramoney* (1998) para 8 as well as Brand D 'What Are Socio-Economic Rights For?' (2003) 35. Please also refer to Biney A 'The historical discourse on African humanism' (2014) 48.

¹³⁸⁰ Scott C & Alston P 'Adjudicating constitutional priorities' *SAJHR* (2000) 268. Please refer to the Constitution of the Republic of South Africa, 1996.

¹³⁸¹ Roux T 'Principle and pragmatism' *International Journal of Constitutional Law* (2009) 117.

¹³⁸² Roux T 'Principle and pragmatism' *International Journal of Constitutional Law* (2009) 117.

¹³⁸³ Roux T 'Principle and pragmatism' *International Journal of Constitutional Law* (2009) 117.

free to accept but elected not to do so.¹³⁸⁴ The second reason being that a detailed analysis of the relevant decision highlights a palpable awareness on the part of the Constitutional Court of pressing political concerns and demonstrated efforts on the part of the Court to utilise 'technical legal devices to lessen the impact of these cases on its institutional security'.¹³⁸⁵

Bilchitz notes that fears had surfaced that the Court would 'overstep its legitimate role' by dictating policy to government.¹³⁸⁶ In this regard he believes that the Court is alive to the aforementioned concerns (which is in keeping with the views of Roux) and should counter these concerns by providing definitive insight as to the litigation principles/standards that the Court would utilise in determining the obligations of the state.¹³⁸⁷ This in turn would ensure that there is clarity about the involvement of the Court in specific cases as well as highlight the extent of its 'own decision-making powers'.¹³⁸⁸

However, Kende believes that the Constitutional Court demonstrated 'its pragmatism and humility' in *Grootboom* by compelling the state to adhere to the Constitution (in ordering that a reasonable part of the housing budget be allocated for those in desperate need of shelter¹³⁸⁹) but sought to provide the state with a measure of discretion in permitting the state to allocate the precise portion of the budget for those in desperate need.¹³⁹⁰ It is submitted that Kende could be viewed as

¹³⁸⁴ *Kaunda v President of the Republic of South Africa* 2005 (4) SALR 235 (CC) (hereafter *Kaunda*) paras 212 - 271. Please note that Justice Mokgoro concurred in the judgment delivered by Justice O' Regan.

¹³⁸⁵ *Kaunda* (2005) para 19.

¹³⁸⁶ Bilchitz D 'Towards a reasonable approach to the minimum core: laying the foundations for future socio-economic rights jurisprudence' 19 *South African Journal on Human Rights* (2003) 10 (hereafter *Towards a reasonable approach to the minimum core*).

¹³⁸⁷ Bilchitz D 'Towards a reasonable approach to the minimum core' *South African Journal on Human Rights* (2003) 10.

¹³⁸⁸ Bilchitz D 'Towards a reasonable approach to the minimum core' *South African Journal on Human Rights* (2003) 10.

¹³⁸⁹ *Grootboom* (2000) para 99.

¹³⁹⁰ Kende MS 'A response to critics' *Connecticut Journal of International Law* (2004) 620.

displaying excessive deference to the state as the state is not called upon to account as to the allocation of scarce resources.

It is my firm contention that one must not lose sight of the duty borne by the state to account for the progressive realisation of urgent socio-economic rights as enshrined in the Constitution. Thus, the Constitutional Court should have an unerring focus on ensuring that the constitutional obligations borne by the state are in fact discharged in the shortest possible time.

Bilchitz believes that the Court should 'adopt a robust approach' to compel the state to discharge its constitutional obligations in the event that the survival of people are threatened.¹³⁹¹ This in turn requires the Court at times to utilise a 'form of supervisory jurisdiction over the implementation of its orders'.¹³⁹² In this regard the research by Pillay demonstrates that socio-economic rights could have an extremely limited impact if the Court does not strictly enforce those same guarantees as well as utilise suitable institutional mechanisms (e.g. supervisory jurisdiction).¹³⁹³ Thus, it should be emphasised that safeguarding the effectiveness and reach of socio-economic rights should counter any concerns about the legitimacy of the Court's role (in relation to the separation of powers doctrine).¹³⁹⁴

It is submitted that the Constitutional Court is the guardian of the Constitution and it is duty-bound to ensure that the state remains accountable in progressively realising critical socio-economic rights as enshrined in the Constitution. It follows that the aforementioned core duties of the Constitutional Court should trump any routine pragmatic considerations (such as securing public support and/or bolstering

¹³⁹¹ Bilchitz D 'Towards a reasonable approach to the minimum core' *South African Journal on Human Rights* (2003) 24.

¹³⁹² Bilchitz D 'Towards a reasonable approach to the minimum core' *South African Journal on Human Rights* (2003) 24.

¹³⁹³ Bilchitz D 'Towards a reasonable approach to the minimum core' *South African Journal on Human Rights* (2003) 25.

¹³⁹⁴ Bilchitz D 'Towards a reasonable approach to the minimum core' *South African Journal on Human Rights* (2003) 26.

institutional security) as contemplated by the Court. Also, the Constitutional Court has to provide the relevant content of those same subsistence rights as a means of guiding the state in devising (and subsequently implementing) suitable benchmarked sectoral targets to bring the deprivation and suffering of vulnerable groups to an end in the shortest possible time.

It is further submitted that a deep-seated understanding of the communal obligations' focus of ubuntu can make a meaningful contribution to the jurisprudence of the Court. Also, the transformative nature of the Constitution can be advanced by dismantling the legacy of apartheid through advancing the subsistence needs of vulnerable groups. This in turn will ensure that the Constitutional Court holds public officials (as the duly appointed representatives of the state) to a higher standard of accountability in giving effect to the progressive realisation of socio-economic rights in the shortest possible time. Furthermore, this will steer the Court to focus on the deprivation endured by vulnerable groups (rather than the reasonableness of state action) in giving effect to the progressive realisation of socio-economic rights. Nonetheless, the compelling contribution by Roux (in relation to the separation of powers in the South African context) demands scrutiny as it sheds light on the decision-making processes of the Constitutional Court as well as the contemporary challenges faced by the Court.

3.7 Summary

The pivotal role of the Constitutional Court has been analysed in this Chapter so as to demonstrate the pressing need for the Court to embrace an oversight role as well as to provide critical determinate content (in relation to socio-economic rights) for the benefit of the state. It is submitted that the aforementioned determinate content is of pivotal importance in facilitating the effective monitoring and enforcement of socio-economic rights. Furthermore, the minimum core obligation approach as endorsed by the ICESCR (and as advanced by Bilchitz) is explored in this Chapter as it is a crucial mechanism in pegging the

accountability of the state (at an appropriate level) so as to bring an end to the deprivation that is endured by vulnerable groups in as short a time as possible.

The *Soobramoney*, *Grootboom* and *TAC* judgments of the Constitutional Court have not provided the state with the necessary guidance in formulating a suitable accountability standard in respect of the progressive realisation of socio-economic rights. In this regard the Court is at fault as it has failed to provide the state with critical determinate content for urgent subsistence rights (despite the incremental improvements on offer in the judgments moving in chronological order from *Soobramoney* through *Grootboom* to *TAC*).

It is my firm belief that the Constitutional Court should endorse the minimum core obligation approach in assessing the accountability of the state in progressively realising subsistence rights as enshrined in the Constitution. In this regard the Constitutional Court should take cognisance of the ratification of the ICESCR by the state and the manner in which the minimum core obligation approach (as endorsed in the ICESCR) will find reception in our domestic law.

It is submitted that the Constitutional Court is likely to have found it easier to order the state to account (as well as implement ongoing supervision of the state) in the *AllPay* and *Black Sash* cases (as compared to the *Soobramoney*, *Grootboom* and *TAC* cases) in light of the fact that the resources (as related to social grant funding) had already been allocated for that very purpose by the state. Thus, the Court was not ‘interfering’ with the allocation/prioritisation of existing state budgets but focussed instead on ensuring that the state gives effect to a key, constitutionally mandated duty (i.e. the uninterrupted payment of social grants to vulnerable people and children) in a manner which could withstand legal scrutiny. Furthermore, with reference to the illuminating insights as offered by Roux in relation to the separation of powers doctrine, it is submitted that the Court would likely have felt emboldened to demand that the state accounts for its dismal failure on an ongoing basis in relation to the *AllPay* social grant payments administration – this in no

small part is due to the vulnerability of the affected grant recipients and the overwhelming public support for a swift and decisive resolution to the debacle.

It is further submitted that the Constitutional Court should embrace the utilisation of a *nuanced* understanding of ubuntu (i.e. the primacy of the communal obligations' focus of ubuntu as espoused in this thesis). This will serve to facilitate a renewed focus on diligent public officials serving their communities/the nation-state through facilitating the progressive realisation of socio-economic rights.

It should be noted that social solidarity will be explored in the next chapter (i.e. Chapter 4) as a means of strengthening our understanding of how embracing diversity serves as an expression of our shared humanity. Furthermore, the anthropological concept of 'lived reality' will be explored more fully in Chapter 4 in order to highlight the nature and extent of the suffering endured by vulnerable groups so as to fashion suitable intervention programmes/laws to come to their aid in the time to come. In conclusion, it is submitted that unwavering accountability on the part of public officials (so as to advance the needs of vulnerable groups) is a critical factor in forging a sustainable version of social solidarity as described in the chapter to follow.

CHAPTER 4: SOCIAL SOLIDARITY - STANDING TOGETHER THROUGH CELEBRATING OUR DIFFERENCES

4.1 Introduction

The previous chapter sought to demonstrate that unwavering accountability on the part of public officials is pivotal in forging a just and caring society in which the needs of vulnerable groups are prioritised. It is submitted that the aforementioned accountability standard is owed to vulnerable groups in light of the socio-economic rights enshrined in the Constitution. It is further submitted that the previous chapter sought to cast light on the pivotal role of the Constitutional Court in holding the state to account in giving effect to critical socio-economic rights. In this regard it was argued that the Court should embrace the minimum core obligation approach as a means to expedite the process by which the state provides vulnerable groups with access to subsistence rights. Furthermore, the previous chapters highlighted the critical role that a nuanced understanding of ubuntu could play in supporting an aspirational vision in which the legacy of apartheid is dismantled through the creation of a just and caring nation-state in which sustainable social solidarity ideals would feature prominently.

Consequently, this chapter will seek to demonstrate that social solidarity is critical in forging a viable and sustainable nation-state in which differences are embraced as an expression of our shared humanity. In this regard the controversial integration debate in Denmark will be explored as a means to develop definitive insights as to how social solidarity is perceived in different quarters in present-day Denmark. Denmark will be compared to South Africa in order to better appreciate the similarities and differences in giving effect to accountability and social solidarity as well as to evaluate the role that ubuntu could play in forging social solidarity in South Africa. It is fair comment that Denmark and South Africa are decidedly different (in so many ways) yet it is my firm contention that Denmark remains an extraordinarily useful lens through which to provide a fresh perspective on social solidarity in South Africa.

It is submitted that anthropology provides a unique vantage point from which to analyse the manner in which social solidarity in Denmark (as well as ubuntu in South Africa) is a political construction and how its present day meaning has been shaped by the dominant political discourse (i.e. the distorted view of social solidarity in Denmark as signifying sameness [and nothing more] as contrasted with ubuntu and its intimate association with forgiveness and political reconciliation [and little else]).

It is contended that both people living in abject poverty in South Africa as well as immigrants and refugees in Denmark can be defined as vulnerable groups. Thus, relevant anthropology themes will be explored as a means to provide a different perspective on how law is experienced on the ground.¹³⁹⁵ In this regard possible mechanisms to facilitate the application and reach of law on the ground (as a means to more effectively address the plight of vulnerable groups) will also be evaluated. It is critical that addressing the needs of vulnerable groups in both Denmark and South Africa are viewed as urgent priorities by the respective states as treating everyone with equal concern (regardless of their differences) is pivotal in forging a just and caring society in which a contemporary version of social solidarity can find purchase.

Identifying vulnerable groups is critical so as to ensure that the state can materially alter the lived reality of those same groups and create opportunities for living lives of purpose much the same like those enjoyed by fellow members of the nation-state. It is my submission that the aforementioned conduct of the state should be construed as treating all members of society with equal concern through providing a platform for all members to live lives of purpose even if this entails certain members requiring additional assistance (on the part of the state) so as to more effectively access an opportunity that is supposedly accessible to all members.

¹³⁹⁵ Please recall that this thesis does not encompass a full anthropology research project as previously highlighted.

In addition, an analysis of Denmark (with specific reference to the political landscape regarding integration challenges) will colour our understanding of social solidarity with the latter concept so much more textured than the commonplace definition of standing together - the true measure of social solidarity is defined by how we can be so very different but still stand together. It is submitted that this nuanced understanding of social solidarity is of critical importance in both South Africa and Denmark. In this regard Eriksen advances a persuasive argument that our destinies are linked as 'humanity, divided as it is by class, culture, geography and opportunities, is fundamentally one'.¹³⁹⁶

In addition, Praeg has sought to explore an understanding of solidarity that could strengthen (as oppose to undermine) the liberal democratic order.¹³⁹⁷ In this regard Tshoose states that:

'The concept of ubuntu shares important characteristics with the concept of solidarity, both the modern social democratic and the Christian democratic variants of the European ideas of solidarity. First, all concepts of solidarity and ubuntu imply a demarcation of unfettered individualism and economic liberalism. Second, today, these concepts tend to emphasise that human beings are interdependent. All ideas of solidarity imply that the government shall have the responsibility for social protection against the hazards of life for its people, although the extent of that responsibility may vary.'¹³⁹⁸

Thus, there is a distinct overlap between social solidarity and ubuntu in that the interdependence and interconnectedness of people is prioritised over unchecked individualism.¹³⁹⁹ The abovementioned insights by Tshoose are indeed a succinct, insightful view of the inherent traits of

¹³⁹⁶ Eriksen TH *What is Anthropology* (2006) 5.

¹³⁹⁷ Praeg L *Report on Ubuntu* (2014) 71.

¹³⁹⁸ Tshoose CI 'The emerging role of the constitutional value of ubuntu for informal social security in South Africa' *African Journal of Legal Studies* 3 12-19 (2009) 19 (hereafter *The emerging role of the constitutional value of ubuntu*).

¹³⁹⁹ Tshoose CI 'The emerging role of the constitutional value of ubuntu' *African Journal of Legal Studies* (2009) 19.

solidarity (whether in Denmark or in South Africa). It follows that social solidarity speaks to the state safeguarding its people from threats which is consistent with the communal obligations' focus of ubuntu in coming to the aid of those in dire need as a means of creating a just and caring society. This further strengthens the assertion advanced in this thesis that a scrutiny of specific aspects of Danish society can indeed yield tangible benefits in South Africa in relation to giving effect to sustainable social solidarity ideals.

Praeg believes that the crux of the emancipation project in a given society can be summed up as fostering a climate of political freedom whilst providing for the socio-economic needs of its people.¹⁴⁰⁰ This is in keeping with the primary thrust of this thesis in forging an accountable public service which strives to realise the critical subsistence rights of vulnerable groups as a means to fashion opportunities for lives of purpose. This in turn gives effect to the core teachings of ubuntu so as to create a society in which differences amongst interconnected and interdependent members are embraced by treating all members as possessing equal worth which in turn leads to the forging of sustainable social solidarity ideals.

The aspirational values of the South African Constitution (with specific reference to the Preamble) outlines the need to 'believe that South Africa belongs to all who live in it, united in our diversity'.¹⁴⁰¹ However, this will only become a reality if we develop the necessary insight about what it means to forge a sustainable model of social solidarity in which all people are treated with equal respect. Thus, it is submitted that a scrutiny of social solidarity (as revised and contested at present in Denmark) will be of benefit in building a sanctuary for all who reside within the borders of South Africa.

¹⁴⁰⁰ Praeg L *Report on Ubuntu* (2014) 147.

¹⁴⁰¹ Constitution of the Republic of South Africa, 1996.

It should be noted that collective identities can indeed accommodate diversity and paradox.¹⁴⁰² Consequently, there is not a specific need for people to be virtually identical in order for them to identify and engage with each other in a pragmatic and meaningful fashion.¹⁴⁰³ Furthermore, collective identification (in the form of national identities) offers sanctuary to various expressions of human diversity.¹⁴⁰⁴ This assures people that can meet the minimal criteria (of membership) of a place to call home and act/engage/identify with each other without an unrelenting focus on all that supposedly divides us.¹⁴⁰⁵ Thus, Jenkins rightfully believes that the creation of a sanctuary for all people living in a country with a diverse population (i.e. both Denmark and South Africa) is possible if the 'minimum membership requirements' are set at the appropriate level.¹⁴⁰⁶ The aforementioned anthropological observations are nothing more than an expression of the 19th century ideology of *folkelig danskhed* (with *folkelig* denoting 'popular' or 'of the people' and *danskhed* denoting 'Danishness') which sought to galvanise the Danish people in confronting the onslaught visited upon them by military disaster, internal inequality and political conflict.¹⁴⁰⁷

4.2 The manner in which social solidarity is understood and embraced in Denmark

4.2.1 Introduction

Denmark is recognised as a pioneer of social solidarity but the contentious present-day debate in Danish society about what constitutes a 'real Dane' provides valuable insight into the manner in which social solidarity is a political construction that is constantly being revised.¹⁴⁰⁸

¹⁴⁰² Jenkins R *Being Danish - Paradoxes of Identity in Everyday Life* (2012) 309 (hereafter *Being Danish*).

¹⁴⁰³ Jenkins R *Being Danish* (2012) 309.

¹⁴⁰⁴ Jenkins R *Being Danish* (2012) 309.

¹⁴⁰⁵ Jenkins R *Being Danish* (2012) 309.

¹⁴⁰⁶ Jenkins R *Being Danish* (2012) 309.

¹⁴⁰⁷ Jenkins R *Being Danish* (2012) 309.

¹⁴⁰⁸ Olwig KF & Paerregaard K "'Strangers" in the nation' in Olwig KF & Paerregaard K (eds) *The Question of Integration: Immigration, Exclusion and the Danish Welfare State* (2011) Introduction (hereafter "Strangers" in the nation).

The dominant political discourse in Denmark at present is that of ethnic Danes versus Danish citizens with immigrant links with the latter group cast as 'the Other'.¹⁴⁰⁹

It is my firm view that the compilation of ethnographic case studies (as edited by Olwig and Paerregaard) represent a sterling contribution to understanding the lived reality of immigrants/vulnerable groups in Denmark (as well as Denmark's critical role as a receiving society) rather than typecasting immigrants as an integration problem. In this regard the contributing authors are all anthropologists living and working in Denmark. The various ethnographic analyses discussed in this chapter are consistent with the enlightened philosophy and teachings on offer at the Anthropology Department at the University of Copenhagen which in turn resonates with my views regarding the (harsh) lived reality of immigrants in Denmark. Furthermore, please see the brief discussion by Morck as well as Wren¹⁴¹⁰ regarding biased academic research in which immigrants are routinely cast as a burden on the welfare system. It follows that the ethnographic cases described in this chapter seek to highlight the challenges endured by immigrants and refugees in Denmark as well as the obstacles presented by Denmark as the receiving society.

The Danish Language Committee, an institution that is tasked with preserving records of the ordinary use/meaning of words in Danish newspapers and other public media sources, has highlighted that the word 'integration' has been utilised in the Danish language since the 19th century.¹⁴¹¹ However, the meaning of the word 'integration' has changed over time (with specific reference to the last fifty years) to reflect an increasingly complex society.¹⁴¹² The concept was subsequently utilised by politicians and social scientists from the 1990s onwards to reflect the

¹⁴⁰⁹ Olwig KF & Paerregaard K "Strangers" in the nation' (2011) Introduction.

¹⁴¹⁰ Please see Section 4.2.3.2.

¹⁴¹¹ Olwig KF & Paerregaard K "Strangers" in the nation' (2011) 11.

¹⁴¹² Olwig KF & Paerregaard K "Strangers" in the nation' (2011) 11.

challenges encountered in seeking to include immigrants and refugees in the Danish welfare society.¹⁴¹³

Jenkins categorises 'white' Danes as an ethnic group and refers to them as 'ethnic Danes' while explaining that his utilisation of inverted commas is a constant reminder that not all Danes embrace this expression.¹⁴¹⁴ However, Jenkins highlights that he cannot suggest a better term to describe 'the realities of everyday identification in Denmark'.¹⁴¹⁵ Consequently, any reference to ethnic Danes in this thesis is in fact a reference to 'white' Danes as per the approach adopted by Jenkins.¹⁴¹⁶ In addition, an analysis of contemporary Danish politics casts light on the manner in which enacted laws have created an unwelcome distinction between ethnic Danes and Danish citizens.¹⁴¹⁷ This is far removed from the core teachings of social solidarity which ultimately seeks to 'include' rather than 'exclude'.¹⁴¹⁸ It should also be noted that the concept of 'sameness' adds a layer of complexity to the integration debate.¹⁴¹⁹

It follows that a present day understanding of the concept of social solidarity in Denmark requires urgent revision so as to include all Danish citizens regardless of their backgrounds.¹⁴²⁰ Thus, the legitimate concern is raised that the requirement of national attachment¹⁴²¹ for Danish citizens has decimated the previously sacred practice that all Danes are equal before the law.¹⁴²² This discussion will be expanded upon through the insightful contribution by Rytter¹⁴²³ in highlighting the distinction drawn in law between ethnic Danes and Danish citizens with immigrant roots.¹⁴²⁴ However, it should be noted at the outset that

¹⁴¹³ Olwig KF & Paerregaard K "Strangers" in the nation' (2011) 11.

¹⁴¹⁴ Jenkins R *Being Danish* (2012) 7.

¹⁴¹⁵ Jenkins R *Being Danish* (2012) 7.

¹⁴¹⁶ Jenkins R *Being Danish* (2012) 7.

¹⁴¹⁷ Olwig KF & Paerregaard K "Strangers" in the nation' (2011) Introduction.

¹⁴¹⁸ Olwig KF & Paerregaard K "Strangers" in the nation' (2011) Introduction.

¹⁴¹⁹ Olwig KF & Paerregaard K "Strangers" in the nation' (2011) Introduction.

¹⁴²⁰ Olwig KF & Paerregaard K "Strangers" in the nation' (2011) Introduction.

¹⁴²¹ National attachment serves to determine whether 'the total national attachment of a married couple consisting of a Dane and a foreign spouse is greater to Denmark than to any other country'.

¹⁴²² Olwig KF & Paerregaard K "Strangers" in the nation' (2011) Introduction.

¹⁴²³ Please see Section 4.2.3.5.

¹⁴²⁴ Olwig KF & Paerregaard K "Strangers" in the nation' (2011) Introduction.

integration and social solidarity are perpetually linked in Danish society.¹⁴²⁵ This is due to social solidarity being typecast (in dominant political discourse) as signifying sameness which has undermined the integration process for immigrants and refugees in Danish society.¹⁴²⁶

Furthermore, the Muhammed cartoon crisis (*Muhammedkrisen*)¹⁴²⁷ will be examined as a means to highlight how the conduct of the Danish government (in failing to come to the aid of a vulnerable group of Danish citizens as defined by their immigrant roots) ably demonstrates the clear divide between ethnic Danes and those Danish citizens with immigrant roots.¹⁴²⁸ The (ethnic) Danes have sought to focus their attention on the manner in which to 'integrate' a foreign population with values and norms which are viewed as primitive (by those same ethnic Danes) into a Danish society that is characterised by liberalism, egalitarianism and an advanced welfare society steeped in culture and tradition.¹⁴²⁹ However, the strict policies adopted by Denmark against its immigrant population over the past few years is a marked departure from sentiments lauding it as an advanced welfare state and a liberal lifestyle haven.¹⁴³⁰ This has in turn shaped its international profile as 'one of the most anti-Islamic and anti-immigration nations in Europe'.¹⁴³¹

4.2.2 The definition of social solidarity in a Danish context

Integration is not a neutral concept in which different groups are linked but rather 'an ideologically loaded concept, linked to Danish ideas of equality and belonging, which in turn are related to notions of cultural similarity closely associated with the Danish welfare state'.¹⁴³² Simmel was fascinated by the seemingly contradictory processes that fashioned

¹⁴²⁵ Olwig KF & Paerregaard K "Strangers in the nation' (2011) Introduction.

¹⁴²⁶ Olwig KF & Paerregaard K "Strangers in the nation' (2011) Introduction. Please refer to Section 4.2.3.5 for a brief but illuminating discussion by Foucault as to the manner in which (dominant) discourse is shaped.

¹⁴²⁷ Please see Section 4.2.3.3.

¹⁴²⁸ Olwig KF & Paerregaard K "Strangers in the nation' (2011) 7.

¹⁴²⁹ Olwig KF & Paerregaard K "Strangers in the nation' (2011) 1.

¹⁴³⁰ Olwig KF & Paerregaard K "Strangers in the nation' (2011) Preface.

¹⁴³¹ Olwig KF & Paerregaard K "Strangers in the nation' (2011) Preface.

¹⁴³² Olwig KF & Paerregaard K "Strangers in the nation' (2011) 1.

society into an integrated whole.¹⁴³³ Olwig and Paerregaard support the view that group integration is brought about 'through a constant oscillation between closeness and distance, intimacy and strangeness, imitation and differentiation. Strangers and difference are fundamental principles in any social interaction'.¹⁴³⁴ Thus, a stark difference is noted between the past focus of integration (i.e. the starting point being that cohesion was fashioned through differences and internal conflicts) and the contemporary focus of integration (i.e. the manner in which divergent individuals and groups could be merged with a pre-existing entity).¹⁴³⁵ It follows that anthropologists and sociologists of old were not focussed on 'whether' integration occurred but 'how' it took place as evidenced by 'the nature of society's cohesion'.¹⁴³⁶

It is submitted that ubuntu can in fact breach this divide in South Africa through its appeal to the interdependence and interconnectedness of people (regardless of their differences) living side by side in an ethical and caring society. In this regard Grillo believes that Denmark, as the receiving society, should find novel ways of engaging with 'newcomers' and shape its institutions to accommodate the needs of the aforementioned 'newcomers'.¹⁴³⁷ However, the reality is somewhat different in Denmark as the state has enacted immigration policies that increasingly place the onerous burden of integration on immigrants and their offspring.¹⁴³⁸

In conclusion, I am in complete agreement with the insightful view, as advanced by Olwig and Paerregaard, that integration as an idea is best described as a broad challenge that is issued to all citizens in a given society rather than being confined to immigrants and refugees in that society.¹⁴³⁹ Thus, all members of a just and caring society should strive

¹⁴³³ Simmel G 'On Individuality and Social Forms' (1971):

¹⁴³⁴ Olwig KF & Paerregaard K "'Strangers" in the nation' (2011) 208.

¹⁴³⁵ Olwig KF & Paerregaard K "'Strangers" in the nation' (2011) 208.

¹⁴³⁶ Olwig KF & Paerregaard K "'Strangers" in the nation' (2011) 208.

¹⁴³⁷ Grillo R 'Danes and others' in Olwig KF & Paerregaard K (eds) *The Question of Integration: Immigration, Exclusion and the Danish Welfare State* (2011) 267 (hereafter Danes and others).

¹⁴³⁸ Grillo R 'Danes and others' (2011) 267.

¹⁴³⁹ Olwig KF & Paerregaard K "'Strangers" in the nation' (2011) 22.

to embrace the challenges of integration in order for sustainable social solidarity principles to take hold.

4.2.3 Specific anthropology insights in relation to the challenges negotiated by immigrants and refugees in Denmark in contemporary times

4.2.3.1 Background

Ethnographic analysis is utilised in anthropology as a means to cast light on the critical issues of globalisation, immigration and integration in Denmark.¹⁴⁴⁰ Denmark is consequently defined as a more specific example of the shaping of the welfare state and the integration of its citizens in a time defined by numerous crises and seemingly perpetual uncertainty.¹⁴⁴¹ The challenges in the immigration sphere in Denmark has presented interested observers with an opportunity to analyse the manner in which a 'close-knit north European society' has reacted to the current forces of globalisation as well as the social and economic shifts that have flowed from that same process.¹⁴⁴²

It is submitted that a scrutiny of contemporary Denmark serves to highlight certain pitfalls that have to be avoided if social solidarity ideals are to flourish in South Africa. In addition, it serves to highlight that sameness is not in fact a prerequisite in forging social solidarity. In this regard difference amongst members can indeed be accommodated in fashioning a sustainable version of social solidarity.

This section of work provides compelling insights as to the grave responsibilities of the state (whether in Denmark or South Africa) to create an environment suitable for a sustainable version of social solidarity to materialise by shaping a public discourse in which the accommodation of differences (rather than sameness) is celebrated. This chapter also serves to confirm that immigrants/refugees and Denmark (as the receiving society) need to participate in ongoing,

¹⁴⁴⁰ Olwig KF & Paerregaard K "‘Strangers’ in the nation’ (2011) Preface.

¹⁴⁴¹ Olwig KF & Paerregaard K "‘Strangers’ in the nation’ (2011) Preface.

¹⁴⁴² Olwig KF & Paerregaard K "‘Strangers’ in the nation’ (2011) 1.

meaningful dialogue in order for a sustainable version of social solidarity to be forged. Furthermore, this chapter serves to highlight the manner in which the communal obligations' focus of ubuntu can in fact make a telling contribution to shaping social solidarity in South Africa through demonstrating that all members of the nation-state should be treated with equal concern and respect.

It is believed that the constant focus on refugees and immigrants as being different to ethnic Danes has led to a determination to undertake the cultural integration of refugees and immigrants into Danish society.¹⁴⁴³ This has had the unfortunate consequence that a vast number of immigrants that have lived in Denmark for years (even generations) are still viewed as not yet belonging in Denmark.¹⁴⁴⁴ The proof of the reluctance to acknowledge immigrants and their descendants as Danish is borne out by the widespread use of terms such as 'second generation immigrant' or 'person of other ethnic origin'.¹⁴⁴⁵

The anthropological themes/ethnographic studies that are described in this chapter serve to emphasise the pivotal role that the Danish welfare institutions assume in the engagement between immigrants and refugees with Danish society.¹⁴⁴⁶ It is important to note that the anthropological concepts of similarity and difference are polar opposites in a conceptual sense.¹⁴⁴⁷ However, it is nonetheless accepted that neither (position) makes sense without the other and that they can consequently be viewed as merging in the concept of identification.¹⁴⁴⁸ Furthermore, identity and/or identification can be defined within a 'basic existential paradox' in which we assume a position on our own as 'self-

¹⁴⁴³ Olwig KF & Paerregaard K "Strangers" in the nation' (2011) 1. Please refer to Jenkins R *Being Danish* (2012) 17 for a brief description of similarity and difference.

¹⁴⁴⁴ Olwig KF & Paerregaard K "Strangers" in the nation' (2011) 1.

¹⁴⁴⁵ Olwig KF & Paerregaard K "Strangers" in the nation' (2011) 1.

¹⁴⁴⁶ Olwig KF & Paerregaard K "Strangers" in the nation' (2011) 19.

¹⁴⁴⁷ Jenkins R *Being Danish* (2012) 17.

¹⁴⁴⁸ Jenkins R *Being Danish* (2012) 17.

conscious human individuals'.¹⁴⁴⁹ This same self-consciousness first presents itself when we keep the company of others (who are exactly in the same position as we are as individuals).¹⁴⁵⁰ Thus, identification bridges the divide between individuality and collectivity and assigns 'every one of us a name and place to stand on each side of that divide'.¹⁴⁵¹ The aforementioned insights offered by Jenkins resonate with me in that ubuntu can be utilised to play a pivotal role in shaping our identity as interdependent and interconnected members of a just and caring society/nation-state.

Ethnographic studies in Denmark that have looked beyond the formal relations created by the engagement with the welfare system have shed light on the informal ties brought about by personal interactions in a variety of social settings.¹⁴⁵² Furthermore, the term micro-integration was coined to describe 'the physical accommodation and social exchange involving strangers interacting' at specific times and in specific places.¹⁴⁵³ It is submitted that this is in keeping with the communal obligations' focus of ubuntu in seeking to forge ties between people living side by side.

The values of 'alikehood and equality' abound in anthropological studies in Scandinavia with the cultural preference for 'alikehood/similarity' featuring prominently as it serves to emphasise that everyone is equal (which is a pivotal cultural notion).¹⁴⁵⁴ Thus, clear hierarchies or established authorities (which are no less prevalent in Scandinavia as compared to anywhere else) are often roundly ignored or denied.¹⁴⁵⁵ This has certainly assisted the Danes in forming and safeguarding the universalist welfare state (in the past) but the formulation of these same

¹⁴⁴⁹ Jenkins R *Being Danish* (2012) 17.

¹⁴⁵⁰ Jenkins R *Being Danish* (2012) 17.

¹⁴⁵¹ Jenkins R *Being Danish* (2012) 17.

¹⁴⁵² Olwig KF & Paerregaard K "'Strangers" in the nation' (2011) 1.

¹⁴⁵³ Olwig KF & Paerregaard K "'Strangers" in the nation' (2011) 21.

¹⁴⁵⁴ Jöhncke S 'Integrating Denmark: the welfare state as a national (ist) accomplishment' in Olwig KF & Paerregaard K (eds) *The Question of Integration: Immigration, Exclusion and the Danish Welfare State* (2011) 40 (hereafter Integrating Denmark).

¹⁴⁵⁵ Jöhncke S 'Integrating Denmark' (2011) 40.

values/cultural ideals in contemporary times (with the ushering in of globalisation as well as the influx of immigrants and refugees) is proving difficult to surmount as the Danish welfare state is not equipped to embrace a 'multi-ethnic and multicultural everyday reality'.¹⁴⁵⁶

It is of pivotal importance to provide a basic overview (of key aspects) of Denmark so as to provide the necessary context for the ethnographic analyses to follow. In this regard Denmark has a population of approximately 5, 5 million people of which approximately 8% (440 000) is comprised of immigrants, refugees and their offspring (also described as second-generation immigrants).¹⁴⁵⁷ Denmark played host in the 1960s and early 1970s to thousands of immigrants (who hailed from the Balkans, Middle East, Pakistan and North Africa) so as to fill posts for unskilled labour.¹⁴⁵⁸ Denmark subsequently accepted (from the mid-1970s onwards) a substantial amount of refugees from politically volatile regions including Vietnam, Sri Lanka, Iraq, the Balkans, Iran, Lebanon and Somalia.¹⁴⁵⁹ It should be noted that the immigration of thousands of poor Polish and Swedish farm labourers to Denmark in the late 19th to early 20th century is often overlooked.¹⁴⁶⁰ The total immigrant population in Denmark is relatively small (with reference to international standards) but it has resulted in the scrutiny of the self-understanding of Denmark 'as a culturally homogenous, egalitarian welfare society with deep historical roots in the Danish landscape'.¹⁴⁶¹

Denmark blends traditional (i.e. farming cooperatives) and modern values (i.e. notions of solidarity as defined by the labour movement) in offering a helping hand to vulnerable people.¹⁴⁶² However, the reach is extended to include all of society as administered by national agencies in the public sector which are funded by general taxation.¹⁴⁶³ The Danish

¹⁴⁵⁶ Jöhncke S 'Integrating Denmark' (2011) 40.

¹⁴⁵⁷ Jenkins R *Being Danish* (2012) 2.

¹⁴⁵⁸ Jenkins R *Being Danish* (2012) 2.

¹⁴⁵⁹ Jenkins R *Being Danish* (2012) 2.

¹⁴⁶⁰ Jenkins R *Being Danish* (2012) 2.

¹⁴⁶¹ Jenkins R *Being Danish* (2012) 2.

¹⁴⁶² Olwig KF & Paerregaard K "'Strangers" in the nation' (2011) 7.

¹⁴⁶³ Olwig KF & Paerregaard K "'Strangers" in the nation' (2011) 7.

welfare state provides significant state support for a myriad of cultural, political and social organisations.¹⁴⁶⁴ Consequently, a significant number of ethnic organisations and Muslim schools have benefitted from the aforementioned state support in recent decades.¹⁴⁶⁵ The Danish welfare state provides ‘cradle to grave’ medical services as well as specialised care for the elderly and the disabled.¹⁴⁶⁶

The state also provides subsidised care and after-school programmes for children from the age of 6 months onwards.¹⁴⁶⁷ The primary institution for shaping social integration in Denmark is day-care (also known as pre-school.)¹⁴⁶⁸ The only other institution which can stake a similar claim, with regards to assuming a prominent role in crafting social integration, is the public school.¹⁴⁶⁹ It is estimated that 96% of all children between the ages of 3 and 5 are in day-care.¹⁴⁷⁰ Day-school programmes are non-compulsory, early childhood programmes with *vuggestuer* (nurseries) for children between the ages of 6 months and 3 years.¹⁴⁷¹ *Børnehaver* (pre-school) is for children between the ages of 3 and 6 years (up to 7 on occasion) at the end of which compulsory schooling commences.¹⁴⁷² Furthermore, the state provides free education from nursery level right through to (and including) tertiary level.¹⁴⁷³

It should be noted that *Dannelse* is a ‘holistic pedagogic philosophy or ideology, at the heart of the Danish education and childcare systems, which simultaneously emphasises individual personal development as well as learning to fit in with the group’.¹⁴⁷⁴ It is viewed as seeking to give equal weighting in the continuous interplay between individuality and

¹⁴⁶⁴ Olwig KF & Paerregaard K “‘Strangers’ in the nation’ (2011) 7.

¹⁴⁶⁵ Olwig KF & Paerregaard K “‘Strangers’ in the nation’ (2011) 7.

¹⁴⁶⁶ Olwig KF & Paerregaard K “‘Strangers’ in the nation’ (2011) 7.

¹⁴⁶⁷ Olwig KF & Paerregaard K “‘Strangers’ in the nation’ (2011) 7.

¹⁴⁶⁸ Bundgaard H ‘Day-care in Denmark: the key to social integration’ in Olwig KF & Paerregaard K (eds) *The Question of Integration: Immigration, Exclusion and the Danish Welfare State* (2011) 150 (hereafter Day-care in Denmark).

¹⁴⁶⁹ Bundgaard H ‘Day-care in Denmark’ (2011) 165.

¹⁴⁷⁰ Bundgaard H ‘Day-care in Denmark’ (2011) 165.

¹⁴⁷¹ Bundgaard H ‘Day-care in Denmark’ (2011) 165.

¹⁴⁷² Bundgaard H ‘Day-care in Denmark’ (2011) 165.

¹⁴⁷³ Bundgaard H ‘Day-care in Denmark’ (2011) 165.

¹⁴⁷⁴ Olwig KF & Paerregaard K “‘Strangers’ in the nation’ (2011) Introduction.

collectivity as well as difference and similarity as 'being human is a paradoxical business'.¹⁴⁷⁵ The aforementioned insights regarding *Dannelse* conjures up interesting images of the interplay between the individual rights regime as per the South African Constitution and the communal obligations' focus of ubuntu.

Furthermore, *Dannelse* is viewed as the modern interpretation of the *Grundtvigian*¹⁴⁷⁶ philosophy of *folkeoplysning* (enlightenment of the people) in which everyone is an individual but no individual should stand out in stark contrast to the group.¹⁴⁷⁷ Thus, individual diversity is protected by embracing the belief that one should be similar to everyone else in key matters.¹⁴⁷⁸ In addition, the notion of *hygge* (loosely translated as 'cosiness') is a foundational and idealised Danish social ethos of 'closeness, warmth, relaxation, informality and egalitarian mutuality'.¹⁴⁷⁹

The Danish flag, *Dannebrog*, emblazoned with a white cross on a red background, is viewed as representing the nation, the proud history of its people and the position of the royal family at the centre of national life.¹⁴⁸⁰ It is apparent that the Danish royal house and *Dannebrog*, each in their own unique way, both 'symbolise and are bound up with the legitimacy of the state and the nation'.¹⁴⁸¹ *Dannebrog* is on constant display in a variety of settings and plays a central role in a variety of events and social occasions.¹⁴⁸² *Dannebrog* is perceived as a fitting way to display respect for others as well as a powerful symbol of bonding in solidarity and fellowship.¹⁴⁸³ It represents the concept of community whether it be within the intimate confines of a family or the 'grand

¹⁴⁷⁵ Jenkins R 'Being Danish' (2012) 201.

¹⁴⁷⁶ Please see Section 4.2.3.3 below.

¹⁴⁷⁷ Jenkins R *Being Danish* (2012) 201.

¹⁴⁷⁸ Jenkins R *Being Danish* (2012) 201.

¹⁴⁷⁹ Jenkins R *Being Danish* (2012) 41.

¹⁴⁸⁰ Jenkins R *Being Danish* (2012) 130.

¹⁴⁸¹ Jenkins R *Being Danish* (2012) 144.

¹⁴⁸² Jenkins R *Being Danish* (2012) 144.

¹⁴⁸³ Jenkins R *Being Danish* (2012) 137. It is submitted that ubuntu can mimic the role of *Dannebrog* in so far as shaping the conduct of fellow members of society so as to forge a just and caring nation as per the judgment delivered in *Khosa* (2004) para 65.

historical abstraction of the nation'.¹⁴⁸⁴ It is submitted that ubuntu, understood as demonstrating an unwavering focus on communal obligations, can in time to come represent (in a South African context) those symbolic notions of *Dannebrog* that seek to foster social solidarity - understood as embracing differences amongst members rather than an unrelenting demand for sameness.

The dominant perception of Denmark as a 'culturally homogenous society' (which was in existence prior to the influx of migrant workers and refugees starting in the 1960s) was principally shaped by significant social and economic developments that spanned the mid-18th to mid-20th centuries rather than the shared ethnic roots of Danes and the uniform embrace of cultural traditions and societal norms.¹⁴⁸⁵

4.2.3.2 The lived reality of immigrants and refugees as compared to ethnic Danes

This section of the thesis is critical to develop an understanding of the lived reality of vulnerable groups (i.e. refugees and immigrants) in Denmark. In this regard the significant obstacles that refugees and immigrants have to negotiate in present day Denmark will be described. It is submitted that we can extract valuable lessons in relation to shaping the lived reality of vulnerable groups in South Africa through employing an anthropological perspective to analyse the lived reality of refugees and immigrants in Denmark.

The labelling of immigrants and refugees as an integration problem is not unique to Denmark.¹⁴⁸⁶ Consequently, Denmark seems destined to undergo further decline into mutual hostility as the divide between 'old Danes' and 'new Danes' (with the latter group almost entirely comprised of individuals following the Islamic faith) displays no sign of closing.¹⁴⁸⁷ Furthermore, the renegotiation of *danskhed* (so as to include people that are not ethnic Danes as proper Danes) is a seemingly utopian

¹⁴⁸⁴ Jenkins R *Being Danish* (2012) 137.

¹⁴⁸⁵ Olwig KF & Paerregaard K "'Strangers" in the nation' (2011) 5.

¹⁴⁸⁶ Olwig KF & Paerregaard K "'Strangers" in the nation' (2011) 23.

¹⁴⁸⁷ Jenkins R *Being Danish* (2012) 305.

suggestion at present if one bears witness to the current realities of Danish politics (as well as global politics).¹⁴⁸⁸

An anthropological perspective, in relation to integration, would make it apparent that the aforementioned concept is not confined to the manner in which migrants are compelled to adjust/find their way in a new society.¹⁴⁸⁹ Integration also refers to general mechanisms of adjustment that have to be endured/negotiated by all individuals in seeking to join a productive society.¹⁴⁹⁰ Thus, a society cannot continue to function over time if individuals or groups do as they please with no regard for the wellbeing of the collective.¹⁴⁹¹ It follows that members of that same society must fashion an agreement about the manner in which they will live side by side as a means of creating a viable society.¹⁴⁹²

The abovementioned agreement does not insist upon cultural conformity but seeks to fashion a common understanding of the nature and extent of the cultural differences which can be accommodated in that society.¹⁴⁹³ It is of critical importance to accept that the aforementioned common understanding will be altered over time as it responds to changing historical contexts.¹⁴⁹⁴ The aforementioned accommodation is a critical insight in reconciling an individual human rights regime with the aspirational vision of forging a just and caring society in which interdependent and interconnected members live side by side through giving effect to the core teachings of ubuntu regarding the primacy of communal obligations. Thus, an anthropological analysis compels one to view 'social communities and cultural ideas of belonging as constructions that are constantly challenged, contested and attributed with new meanings'.¹⁴⁹⁵ The aforementioned analysis is of considerable

¹⁴⁸⁸ Jenkins R *Being Danish* (2012) 305.

¹⁴⁸⁹ Olwig KF & Paerregaard K "Strangers" in the nation' (2011) 11.

¹⁴⁹⁰ Olwig KF & Paerregaard K "Strangers" in the nation' (2011) 11.

¹⁴⁹¹ Olwig KF & Paerregaard K "Strangers" in the nation' (2011) 11.

¹⁴⁹² Olwig KF & Paerregaard K "Strangers" in the nation' (2011) 12.

¹⁴⁹³ Olwig KF & Paerregaard K "Strangers" in the nation' (2011) 12.

Please see Jenkins R *Being Danish* (2012) 309.

¹⁴⁹⁴ Olwig KF & Paerregaard K "Strangers" in the nation' (2011) 12.

¹⁴⁹⁵ Olwig KF & Paerregaard K "Strangers" in the nation' (2011) 12.

interest as it sheds light on the manner in which the meaning of social solidarity will be persistently contested and redefined over time which is consistent with the views of Praeg in relation to ubuntu as previously described.¹⁴⁹⁶ Furthermore, it is necessary to emphasise that the integration debate has overwhelmingly focussed on the challenges presented by immigrants and refugees rather than exploring the difficulties posed by Denmark as a receiving society.¹⁴⁹⁷

Henkel believes that three factors have played a pivotal role in the progressive integration of Denmark.¹⁴⁹⁸ Firstly, the elevated position occupied by the Danish Lutheran Church as the state church has been an integral component of the Danish constitutional order since 1848.¹⁴⁹⁹ Secondly, the co-operative movement in Denmark made a telling contribution to the economic integration of Danish society.¹⁵⁰⁰ The cooperatives played a critical role in the development of a rapidly expanding agro-industry between 1850 and 1950 as well as shaping the food retail business and housing supply in urban areas.¹⁵⁰¹ Thirdly, the *Kanslergade* Agreement of 1933 created a shared political platform which would give rise to a social welfare state that would be of benefit at all social levels.¹⁵⁰² The aforementioned agreement served as a social model blueprint for a number of Western European countries after World War II.¹⁵⁰³ Unsurprisingly, Danish society was characterised by an extraordinary level of integration on the political, economic and social fronts in the wake of a single-minded focus on social consensus.¹⁵⁰⁴

¹⁴⁹⁶ Praeg L *Report on Ubuntu* (2014) Introduction.

¹⁴⁹⁷ Olwig KF & Paerregaard K "Strangers" in the nation' (2011) 14.

¹⁴⁹⁸ Henkel H 'Contesting Danish civility: the cartoon crisis as transitional drama' in Olwig KF & Paerregaard K (eds) *The Question of Integration: Immigration, Exclusion and the Danish Welfare State* (2011) 139 (hereafter *Contesting Danish civility*).

¹⁴⁹⁹ Henkel H 'Contesting Danish civility' (2011) 139. Please see Jensen TG 'To be Danish and Muslim: Internalizing the Stranger?' Olwig KF & Paerregaard K (eds) *The Question of Integration: Immigration, Exclusion and the Danish Welfare State* (2011) 95 (hereafter *To be Danish and Muslim*).

¹⁵⁰⁰ Henkel H 'Contesting Danish civility' (2011) 139.

¹⁵⁰¹ Henkel H 'Contesting Danish civility' (2011) 139.

¹⁵⁰² Henkel H 'Contesting Danish civility' (2011) 139.

¹⁵⁰³ Henkel H 'Contesting Danish civility' (2011) 139.

¹⁵⁰⁴ Henkel H 'Contesting Danish civility' (2011) 139.

The adoption of a set of civic virtues, of *Dankshed*, is 'thus simultaneously the likely result of this historical process of integration and the precondition for being recognised as a proper citizen of Danish society'.¹⁵⁰⁵ Thus, *Dankshed* could be viewed as excluding anyone that is visibly different from ethnic Danes – it is submitted that this is (as a rule) the lived reality of refugees and immigrants in Denmark. In this regard the insight offered by Jensen as to Muslim refugees and immigrants being rendered visibly different through their Islamic attire (as discussed more fully below) neatly captures the conundrum of immigrants that want to participate on an equal footing with ethnic Danes in Danish society. It follows that their Islamic garb makes this virtually impossible as they are inevitably viewed as not being capable of being *real* Danes.

The link forged between sameness, something possessed of substance and a resolute inner core is evident in the work of the Danish theologian and educator, Hal Koch.¹⁵⁰⁶ Koch is best known for advocating a Danish vision of democracy (in the time following World War Two) which is still evident in contemporary Danish political culture.¹⁵⁰⁷ Koch believed that democracy was not so much a version of a political system but rather embracing a way of life based on common values.¹⁵⁰⁸ His vision is imbued with Christian values and calls for a public awakening in which people are 'socialised and educated into democratic thinking'.¹⁵⁰⁹ Koch emphasised the need for dialogue (as a means to create a common set of values shaped by the inner constitution of people) in giving effect to democracy.¹⁵¹⁰ The concept of an 'inner constitution' is of considerable interest as it can be utilised to give effect to problematic nationalistic tendencies that exclude certain groups.¹⁵¹¹ However, it is my view that it

¹⁵⁰⁵ Henkel H 'Contesting Danish civility' (2011) 139.

¹⁵⁰⁶ Sjørøsløv I 'The paradox of integration: excluding while claiming to integrate into Danish society' in Olwig KF & Paerregaard K (eds) *The Question of Integration: Immigration, Exclusion and the Danish Welfare State* (2011) 87 (hereafter *The paradox of integration*).

¹⁵⁰⁷ Sjørøsløv I 'The paradox of integration' (2011) 87.

¹⁵⁰⁸ Sjørøsløv I 'The paradox of integration' (2011) 87.

¹⁵⁰⁹ Sjørøsløv I 'The paradox of integration' (2011) 87.

¹⁵¹⁰ Sjørøsløv I 'The paradox of integration' (2011) 87.

¹⁵¹¹ Please see Chapter 4.2.3.5.

can also be harnessed for positive change if that inner constitution is shaped by a communal obligations' focus on the part of individuals in order to forge a just and caring nation-state in which all people are treated with equal importance.

The notion of a culturally homogenous society is premised on the belief of a present day welfare state forged by like-minded people over a considerable period of time in realising the vision of a modern society noted for its egalitarianism and justice ideals.¹⁵¹² However, politicians and the media conveniently ignore the increase in discrimination displayed against non-ethnic Danes as well as the underlying racism in xenophobic tirades directed at ethnic/religious minorities such as Muslims.¹⁵¹³ This serves to confine the challenges of integration to non-ethnic Danes as opposed to including ethnic Danes in that same discussion.¹⁵¹⁴ Consequently, refugees and immigrants are faced with a virtually impossible task in seeking to integrate in Danish society as ethnic Danes would need to openly embrace engagement (on equal terms) with the aforementioned refugees and immigrants. It would in fact require the aforementioned open (and ongoing) engagement to facilitate the shaping of a society capable of accommodating difference (a certain amount of difference that is) whilst grappling with the creation of a platform so as to facilitate living lives of purpose for one and all.

It is noteworthy that there have been a few Danish scholars that have been critical of the manner in which the media and politicians discuss the issues of immigration and integration.¹⁵¹⁵ However, a substantial component of Danish migration research is directed at 'culturally problematic immigrants and refugees'.¹⁵¹⁶ This has led the migration researcher, Morck, to criticise fellow academics for perceiving immigrants and refugees as 'problem cases' for the Danish welfare

¹⁵¹² Olwig KF & Paerregaard K "Strangers" in the nation' (2011) 6.

¹⁵¹³ Olwig KF & Paerregaard K "Strangers" in the nation' (2011) 6.

¹⁵¹⁴ Olwig KF & Paerregaard K "Strangers" in the nation' (2011) 6.

¹⁵¹⁵ Olwig KF & Paerregaard K "Strangers" in the nation' (2011) 15.

¹⁵¹⁶ Olwig KF & Paerregaard K "Strangers" in the nation' (2011) 15.

state.¹⁵¹⁷ It is fair comment that the perception has taken hold that immigrants and refugees are an onerous burden on the Danish welfare system.¹⁵¹⁸ Wren has made the observation that Danish scholars exhibited 'cultural racism' when immersed in immigration and integration studies.¹⁵¹⁹ This form of racism was shaped by 'the cultural bias of academic research, which has been very closely connected with public policy' and this in turn has led to insufficient scrutiny of the critical role of the social structure of Danish society.¹⁵²⁰

It follows that there is a need to be mindful of the manner in which we shape the debate (for better or worse) in relation to politically-charged terms such as 'integration' (or 'ubuntu' for that matter). Also, the plight of vulnerable people (whether immigrants/refugees in Denmark or people living in abject poverty in South Africa) should be a pressing priority for their respective states which readily serves to add credence to the assertion that the integration/social solidarity debate in Denmark is indeed relevant in the South African context.

The 'barrier-building' exhibited by Danish society towards immigrants and refugees cannot be understood by a superficial reference to 'racist or xenophobic tendencies' in Danish society.¹⁵²¹ In this regard Danes are finding it exceedingly difficult to embrace a refined understanding of Denmark as a welfare state (in the era of globalisation) in which interconnectedness and interdependence is taking hold.¹⁵²²

It is submitted that this is no different to the lived reality in South Africa in which ubuntu can serve to aid the negotiation of the challenges faced by interdependent and interconnected people living side by side in a *pluricultural* nation state. This can be achieved by demonstrating equal concern for all people in giving expression to sustainable social solidarity

¹⁵¹⁷ Morck Y 'Bindestregsdanskere: fortællinger om kon, generationer og etnicitet' *Frederiksberg: Forlaget Sociologi* (1998) 35.

¹⁵¹⁸ Olwig KF & Paerregaard K "'Strangers" in the nation' (2011) 15.

¹⁵¹⁹ Wren K 'Cultural Racism: Something Rotten in the State of Denmark' *Social and Cultural Geography* 2 (2) (2001) 152.

¹⁵²⁰ Wren K 'Cultural Racism: Something Rotten in the State of Denmark' *Social and Cultural Geography* 2 (2) (2001) 152.

¹⁵²¹ Olwig KF & Paerregaard K "'Strangers" in the nation' (2011) 15.

¹⁵²² Olwig KF & Paerregaard K "'Strangers" in the nation' (2011) 15.

ideals – this would as a rule entail providing for the needs of fellow members whose lives are placed at risk by virtue of an inability to access critical subsistence rights.

It should be noted that ‘Danishness’ and ‘the welfare state’, as coloured by the historical development of Danish society and the present day welfare state immersed in a global village respectively, are ‘inseparable’.¹⁵²³ It should be apparent that ‘Danishness’ and the welfare state are diametrically opposed in certain instances yet remain firmly intertwined (and should be construed as interconnected).¹⁵²⁴ This has the unfortunate consequence that immigrants and refugees will continue to be viewed as being alien to Danish society despite the best efforts of the welfare system to oversee the ‘integration’ of immigrants and refugees.¹⁵²⁵ Thus, a critical need is identified to safeguard and strengthen a social welfare society which is ‘based on a system of social solidarity that is closely connected with shared cultural values, in a globalising world of increasing interconnectivity and mobility’.¹⁵²⁶ It is submitted that this mimics the appeal of the vision of an ubuntu-inspired public service, striving to realise the urgent subsistence rights of vulnerable groups, so as to fashion a nation-state in which social solidarity is forged through treating all people in South Africa as having equal importance regardless of their cultural background.

The lived experiences of immigrants and refugees in Denmark are reminiscent of the trying circumstances that have to be endured by vulnerable groups in South Africa. The state (both in Denmark and South Africa) should seek to extend every protection to vulnerable groups as previously outlined. This can be facilitated by engaging in constructive dialogue (which serves to colour and shape the dominant political discourse) so as to ensure that adequate and appropriate service offerings are provided to vulnerable groups. This will facilitate the

¹⁵²³ Olwig KF & Paerregaard K “‘Strangers’ in the nation’ (2011) 16.

¹⁵²⁴ Olwig KF & Paerregaard K “‘Strangers’ in the nation’ (2011) 16.

¹⁵²⁵ Olwig KF & Paerregaard K “‘Strangers’ in the nation’ (2011) 16. Please refer to Sjørsløv I ‘The paradox of integration’ (2011) 80 for insight with regards to the ‘us-them’ dichotomy which is prevalent in Denmark.

¹⁵²⁶ Olwig KF & Paerregaard K “‘Strangers’ in the nation’ (2011) 16.

creation of a society in which social solidarity is given expression through all people being treated as having equal worth. Furthermore, the lingering perception of immigrants and refugees as a 'social problem' has sought to disregard the desirable attributes that these groups possess.¹⁵²⁷ However, it is true that the Danish welfare system has provided immigrants with substantial economic and social assistance.¹⁵²⁸

The Danish welfare society is capable of addressing challenges in education, health and housing but it falls woefully short in fashioning the social and emotional factors which can promote lives filled with purpose and promise for all.¹⁵²⁹ Thus, immigrants and refugees (with non-Danish ethnic roots) are often viewed as 'tantamount to being a problem case for the welfare system'.¹⁵³⁰ Danish society has failed to confront the challenges of globalisation (as previously mentioned) and has instead focussed on 'categories of cultural difference'.¹⁵³¹ Thus, the dominant public discourse serves to shape and consolidate the belief that 'equality and cohesion are incompatible with immigration and heterogeneity'.¹⁵³²

Henkel refers to the work of Habermas in highlighting that the Danish majority, with reference to the role of Islam in society, has failed to make a critical distinction between its own cultural tradition and the political culture of Denmark.¹⁵³³ The aforementioned cultural tradition is shaped by a historical experience shared by the majority whereas the political culture should be negotiated between all citizens.¹⁵³⁴ Thus, the distinction drawn between 'the cultural tradition of a majority society and a country's political culture is the structural condition for a democratic society under *pluricultural* conditions'.¹⁵³⁵ The aforementioned insights

¹⁵²⁷ Olwig KF & Paerregaard K "'Strangers" in the nation' (2011) 16.

¹⁵²⁸ Olwig KF & Paerregaard K "'Strangers" in the nation' (2011) 16.

¹⁵²⁹ Olwig KF & Paerregaard K "'Strangers" in the nation' (2011) 21.

¹⁵³⁰ Olwig KF & Paerregaard K "'Strangers" in the nation' (2011) 21.

¹⁵³¹ Olwig KF & Paerregaard K "'Strangers" in the nation' (2011) 21.

¹⁵³² Olwig KF & Paerregaard K "'Strangers" in the nation' (2011) 22.

¹⁵³³ Henkel H 'Contesting Danish civility' (2011) 144.

¹⁵³⁴ Henkel H 'Contesting Danish civility' (2011) 144.

¹⁵³⁵ Habermas J *The Inclusion of the Other* (1998) 105.

offered by Henkel provide extraordinary insight with regards to shaping a viable political culture in the rainbow nation that is South Africa.

It is submitted that a scrutiny of the abovementioned ethnographic analyses serves to demonstrate the telling manner in which anthropology can colour our understanding of the lived reality of vulnerable groups (be it in Denmark or South Africa). This in turn will ensure that the relevant state has the necessary insight to meet the legitimate needs of vulnerable groups as a means to shape a society predicated on sustainable social solidarity ideals.

4.2.3.3 The ideological tussle between the Danish Lutheran Church and Islam

It is submitted that developing a nuanced understanding of the specific challenges endured by (Muslim) immigrants and refugees in Denmark is critical. That is, if one seeks to understand the manner in which the dominant public discourse in Denmark has sought to emphasise that sameness is a prerequisite for forging social solidarity in Denmark. It follows that this automatically excludes the visibly different Muslim immigrants and refugees.

Nikolai Grundtvig (1783 -1872) led the Lutheran reform movement which cemented the prominent position of the Danish Lutheran Church (*folkekirken*) in Danish society.¹⁵³⁶ Grundtvig breathed life into a Christian-national sentiment that was embraced by all Danes (including the poor from rural areas).¹⁵³⁷ The Danish Lutheran Church is supported by the Danish State and has a membership of approximately 4.5 million members.¹⁵³⁸

The Constitution provides for freedom of religion but the state is bound by the Constitution to support the Danish National Church.¹⁵³⁹ Islam has

¹⁵³⁶ Henkel H 'Contesting Danish civility' (2011) 139.

¹⁵³⁷ Henkel H 'Contesting Danish civility' (2011) 139.

¹⁵³⁸ Rubow C 'Religion and integration: three Danish models for the relationship between religion and society' in Olwig KF & Paerregaard K (eds) *The Question of Integration: Immigration, Exclusion and the Danish Welfare State* (2011) 95 (hereafter Religion and integration).

¹⁵³⁹ Rubow C 'Religion and integration' (2011) 96.

been viewed by the aforementioned Church as either a potential or actual threat to Danish society or alternatively (in select ecclesiastical circles) as an opportunity to reflect on the role of the Church in a changing society.¹⁵⁴⁰ *Dannelse* is viewed as the modern interpretation of the Grundtvigian philosophy of *folkeoplysning* (enlightenment of the people as previously stated) in which everyone is an individual but no individual must stand out in stark contrast to the group.¹⁵⁴¹ Thus, individual diversity is protected by embracing the belief that one should be similar to everyone else in key matters.¹⁵⁴² It is submitted that this is reminiscent of the benevolent coercion (which is ever-present in ubuntu) which regulates the conduct of members as a means to forge social solidarity.

It is necessary to highlight that the 'integration problem' does not refer to European immigrants as such but rather to immigrants who are visibly different (as previously described) and display significantly different religious beliefs (i.e. mainly Muslim migrants).¹⁵⁴³ It follows that talk of integration (both in Denmark and in Europe) is more often than not actually about the 'immigrant problem' which in turn is often code for 'the Muslim problem'.¹⁵⁴⁴

The consensus model reigns supreme in the Church despite critical differences of opinion between clergy who discharge their duties in keeping with their respective (and varied) perceptions of the role of the Church as a public institution.¹⁵⁴⁵ Thus, internal differences are rendered invisible and enable the forging of a community which is capable of including everybody.¹⁵⁴⁶ However, the cherished ideals of homogeneity and consensus can only remain intact if the majority emphasise their similarities and actively seek to minimise perceptions of differences.¹⁵⁴⁷

¹⁵⁴⁰ Rubow C 'Religion and integration' (2011) 96.

¹⁵⁴¹ Jenkins R *Being Danish* (2012) 201.

¹⁵⁴² Jenkins R *Being Danish* (2012) 201.

¹⁵⁴³ Jenkins R *Being Danish* (2012) 257.

¹⁵⁴⁴ Jenkins R *Being Danish* (2012) 257.

¹⁵⁴⁵ Olwig KF & Paerregaard K "'Strangers' in the nation' (2011) 18.

¹⁵⁴⁶ Olwig KF & Paerregaard K "'Strangers' in the nation' (2011) 18.

¹⁵⁴⁷ Olwig KF & Paerregaard K "'Strangers' in the nation' (2011) 18.

It follows that the present debate on 'homogeneity and difference, consensus and conflict, social inclusion and exclusion, and the social practices with which this debate is connected' substantially shape the conditions for integration in Danish society as well as how integration is subsequently safeguarded and/or contested.¹⁵⁴⁸ It should be noted that this debate has been marred by increasing Islamophobia and it is hardly remarkable that it is now a commonly held belief that Danish culture is incompatible with a Muslim culture/Islam.¹⁵⁴⁹ This provides insight with regards to ongoing debates as to the extent to which Muslims should be permitted to have separate Muslim cemeteries (or build mosques) and in so doing render visible the reduction of (ethnic) Danish public space.¹⁵⁵⁰

It is critical to note that cultural homogeneity as embraced by the Danes is characterised by individual freedom, personal choice and social engagement (rather than an insistence on conformity).¹⁵⁵¹ However, it is the aforementioned (three) values which the Danes believe are being undermined by immigrants and refugees as the latter groups have embraced religious (Islamic) beliefs that are viewed as extremist, oppressive, insist upon arranged marriages (more often than not viewed as forced marriages) and supposedly demonstrate excessive commitment to their families.¹⁵⁵² Consequently, this is contrary to the beliefs of numerous Danes who view the welfare state as being shaped by a national collective of people who have embraced a European way of life 'based on respect for individual choice and autonomy as well as a sense of social solidarity'.¹⁵⁵³ It is assumed that these values do not resonate with the beliefs of refugees and immigrants.¹⁵⁵⁴

¹⁵⁴⁸ Olwig KF & Paerregaard K "Strangers" in the nation' (2011) 18.

¹⁵⁴⁹ Olwig KF & Paerregaard K "Strangers" in the nation' (2011) 18.

¹⁵⁵⁰ Olwig KF & Paerregaard K "Strangers" in the nation' (2011) 18.

¹⁵⁵¹ Olwig KF & Paerregaard K "Strangers" in the nation' (2011) 7.

¹⁵⁵² Olwig KF & Paerregaard K "Strangers" in the nation' (2011) 7. Please refer to Jensen TG 'To be Danish and Muslim' (2011) 112.

¹⁵⁵³ Olwig KF & Paerregaard K "Strangers" in the nation' (2011) 8.

¹⁵⁵⁴ Olwig KF & Paerregaard K "Strangers" in the nation' (2011) 8.

Sjorslev¹⁵⁵⁵ has noted that the xenophobic rhetoric, aimed at Muslims, is a display of power rooted in the spoken word and has adverse consequences in real life.¹⁵⁵⁶ Danes have (in everyday conversation) taken to replace the word 'immigrant' with 'Muslim' to depict anyone foreign to Danish society so as to emphasise that being Muslim excludes one from being Danish.¹⁵⁵⁷ Muslim immigrants are portrayed in the media as assuming a position which is diametrically opposed to the coveted Danish ideals of democracy, liberal views and progressive values.¹⁵⁵⁸ Thus, ethnic Danes that have converted to Islam are described as having 'undergone fundamental and radical processes of transformation' and their conversion is portrayed as 'abdicating their Danishness' or 'emigrating from Danish society'.¹⁵⁵⁹ Nonetheless, it should be noted that approximately 3000 Danes have converted to Islam in the past four decades.¹⁵⁶⁰

Consequently, the categories 'Danish' and 'Muslim' are viewed as mutually exclusive which is consistent with the dominant political discourse.¹⁵⁶¹ However, this must be contrasted with Danish converts to Islam who illustrate the 'quiet integration' which occur in daily, commonplace interactions in Denmark.¹⁵⁶² In this regard Jensen shares insights gleaned from ethnographic cases involving different Danish converts and their respective ways of embracing lives as Muslims as well as their respective interactions with both ethnic Danes and Muslim immigrants.¹⁵⁶³ The aforementioned ethnographic study highlights 'multifarious identifications, continuities and relationships between Danish and Muslim identities' that are in stark contrast with external

¹⁵⁵⁵ Please see Section 4.2.3.5 for an expanded discussion regarding the power rooted in the spoken word.

¹⁵⁵⁶ Jensen TG 'To be Danish and Muslim' (2011) 112.

¹⁵⁵⁷ Jensen TG 'To be Danish and Muslim' (2011) 112.

¹⁵⁵⁸ Olwig KF & Paerregaard K "'Strangers' in the nation' (2011) 18.

¹⁵⁵⁹ Olwig KF & Paerregaard K "'Strangers' in the nation' (2011) 18.

¹⁵⁶⁰ Olwig KF & Paerregaard K "'Strangers' in the nation' (2011) 18.

¹⁵⁶¹ Jensen TG 'To be Danish and Muslim' (2011) 113.

¹⁵⁶² Jensen TG 'To be Danish and Muslim' (2011) 113.

¹⁵⁶³ Jensen TG 'To be Danish and Muslim' (2011) 113.

xenophobic rhetoric that depict converts as having discarded their Danishness on embracing Islam.¹⁵⁶⁴

The conversion to Islam is viewed as an ongoing process of cultural complexity as evidenced by the continuous interaction between various actors and cultural traditions which culminate in new identities being summoned forth.¹⁵⁶⁵ The new Muslim identity assumed by the convert represents either rupture or continuity with the identity which was in place prior to the conversion.¹⁵⁶⁶ New converts tend to emphasise rupture yet over time lean towards continuity with the latter representing a fusion of identities.¹⁵⁶⁷ Consequently, the 'polarisation' which manifests between Muslim and Danish identities does not endure in the 'quiet integration of lived lives'.¹⁵⁶⁸ Thus, an illuminating insight is offered in which the conversion to Islam should not be viewed as a rupture but could instead be viewed as an example of integration.¹⁵⁶⁹

It is submitted that a deep-seated understanding of the challenges endured by Muslim immigrants and refugees should serve to sensitise public officials as to the plight of specific vulnerable groups and how to assist those same vulnerable groups to live lives of purpose. This can in fact be achieved by creating opportunities for dialogue and meaningful participation in shaping a nation-state in which social solidarity principles will flourish. Thus, it is my firm belief that an understanding of the concepts of sameness and difference (with reference to visibly different vulnerable groups) as well as inclusion and exclusion (as explored in section 4.2.3.5) can play a pivotal role in augmenting the accountability of public officials in South Africa. This can be brought about by nurturing the social conscience of the aforementioned officials - in order to ensure that vulnerable groups are treated with equal concern and that vulnerable groups are as a rule considered (and included) when devising

¹⁵⁶⁴ Jensen TG 'To be Danish and Muslim' (2011) 113.

¹⁵⁶⁵ Jensen TG 'To be Danish and Muslim' (2011) 114.

¹⁵⁶⁶ Jensen TG 'To be Danish and Muslim' (2011) 117.

¹⁵⁶⁷ Jensen TG 'To be Danish and Muslim' (2011) 117.

¹⁵⁶⁸ Jensen TG 'To be Danish and Muslim' (2011) 117. Please see Jenkins R *Being Danish* (2012) 309.

¹⁵⁶⁹ Jensen TG 'To be Danish and Muslim' (2011) 117.

projects that aim to strengthen social solidarity principles in the nation-state.

However, the Muhammed cartoons as published in a Danish newspaper, *Jyllands-Posten*, on 30 September 2005 served to highlight the simmering tensions between safeguarding (a version of) the freedom of expression and a clear disregard for Muslims in Denmark and elsewhere in the West.¹⁵⁷⁰ The cartoon crisis is routinely described as a vigorous debate regarding the freedom of expression.¹⁵⁷¹ However, the analysis by Henkel¹⁵⁷² offers a richly textured examination of the critical issues that defined the controversy (including the challenges of integration) which is far removed from the notion of Denmark as one of the pioneers of social solidarity.¹⁵⁷³

The blunt refusal to recognise Muslims as part of Danish society is the critical factor in making sense of why the publication of the Muhammed cartoons courted controversy and brought about an ill-natured crisis.¹⁵⁷⁴ Henkel seeks to persuade the reader to assume the view that the complex events in question could best be described as a 'transitional drama' which was concerned with 'an ongoing struggle for recognition'.¹⁵⁷⁵ The aforementioned struggle was not only confined to the acceptance/recognition of Muslims as legitimate citizens/residents in Danish society but also the recognition of legitimate societal demands levelled against Muslims by Danish society.¹⁵⁷⁶ In addition, it sought to ascertain 'the forms of identity that can mutually be recognised as Danish'.¹⁵⁷⁷ However, Henkel believes that a solution to the ethno-

¹⁵⁷⁰ *Jyllands-Posten* 9 October 2005. Please see Olwig KF & Paerregaard K "Strangers" in the nation' (2011) 1.

¹⁵⁷¹ Olwig KF & Paerregaard K "Strangers" in the nation' (2011) 1.

¹⁵⁷² Professor Heiko Henkel was one of my key mentors during my sojourn at the Anthropology Department at the University of Copenhagen in 2015.

¹⁵⁷³ Olwig KF & Paerregaard K "Strangers" in the nation' (2011) 1.

¹⁵⁷⁴ Olwig KF & Paerregaard K "Strangers" in the nation' (2011) 19. Please see Jenkins R *Being Danish* (2012) 309.

¹⁵⁷⁵ Olwig KF & Paerregaard K "Strangers" in the nation' (2011) 19.

¹⁵⁷⁶ Olwig KF & Paerregaard K "Strangers" in the nation' (2011) 19.

¹⁵⁷⁷ Olwig KF & Paerregaard K "Strangers" in the nation' (2011) 19.

religious conflict can only be brought about by fashioning a novel/revised blueprint premised on mutual understanding and recognition.¹⁵⁷⁸

Jyllands-Posten (newspaper) published twelve 'Muhammed cartoons' as previously requested from members of the Danish National Association of Cartoonists.¹⁵⁷⁹ Henkel believed that the publication of the cartoons had exacerbated the palpable tension which had been building up over time as Muslims had been viewed with ever-increasing suspicion since the September 2001 attacks in the United States.¹⁵⁸⁰ Furthermore, Muslims felt that their legitimate demands had not been acknowledged by Danish society and the state.¹⁵⁸¹

It is important to note that *Jyllands-Posten* had briefed the cartoonists to provide images of the Prophet Muhammed - the cartoons which were subsequently submitted varied in style and content.¹⁵⁸² A number of the cartoonists did in fact render offensive images of a volatile and misogynistic Oriental but some cartoonists elected to submit 'non-confrontational' pictures.¹⁵⁸³ The twelve cartoons were published side by side with commentary provided by the journalist, Fleming Rose, in which he had highlighted that the brief issued to cartoonists was to protest the acquiescence of the Danish public to unreasonable and unacceptable demands made by Muslims.¹⁵⁸⁴ Rose believed that it was the duty of the press to dismiss religious sensitivities out of hand so as to resist the imposition of these same concerns on Danish society.¹⁵⁸⁵ Henkel believes that the cartoon crisis could be viewed as a test of the nature and limits of Danish civility.¹⁵⁸⁶

¹⁵⁷⁸ Olwig KF & Paerregaard K "'Strangers" in the nation' (2011) 19.

¹⁵⁷⁹ Henkel H 'Contesting Danish civility' (2011) 131.

¹⁵⁸⁰ Henkel H 'Contesting Danish civility' (2011) 131.

¹⁵⁸¹ Henkel H 'Contesting Danish civility' (2011) 131.

¹⁵⁸² Henkel H 'Contesting Danish civility' (2011) 132.

¹⁵⁸³ Henkel H 'Contesting Danish civility' (2011) 132.

¹⁵⁸⁴ *Jyllands-Posten* 9 October 2005.

¹⁵⁸⁵ *Jyllands-Posten* 9 October 2005.

¹⁵⁸⁶ Henkel H 'Contesting Danish civility' (2011) 132.

The publication of the cartoons in *Jyllands-Posten* unleashed a frantic debate about whether the newspaper had the right to publish them.¹⁵⁸⁷ Or, whether in fact, it had a civic duty to publish the cartoons so as to give effect to (a particular version of) the 'freedom of expression'.¹⁵⁸⁸ The aforementioned debate explored the manner in which (and to what extent) the sensitivities of the Muslim minority should be acknowledged and whether the (offensive) cartoons should consequently be withdrawn and the newspaper should issue an apology.¹⁵⁸⁹ Furthermore, the debate sought to ascertain whether the cartoons could properly be perceived as an acceptable form of debate or an act of defamation.¹⁵⁹⁰ Henkel offers an illuminating insight in depicting the debate as an exploration of the alternative ways of living and particular moral sensitivities which could muster approval as properly belonging to Danish society.¹⁵⁹¹

It should be noted that there were no definite decisions taken with regards to whether the newspaper was correct in publishing the cartoons nor whether the state had an obligation to protect the interests of a minority group.¹⁵⁹² However, the reality is that *Jyllands-Posten* emerged as the 'victor' in the sense that it commanded extraordinary public support and the Danish government elected not to intervene.¹⁵⁹³ In this regard the discipline of anthropology has outlined the concept of 'inaction is also an action' which appears to be an excellent portrayal of the conduct of the Danish government with regards to the cartoons crisis.¹⁵⁹⁴ This served to confirm that the plight (and sensitivities) of a vulnerable minority group in Denmark was seemingly of limited concern to the

¹⁵⁸⁷ Henkel H 'Contesting Danish civility' (2011) 132.

¹⁵⁸⁸ Henkel H 'Contesting Danish civility' (2011) 129.

¹⁵⁸⁹ Henkel H 'Contesting Danish civility' (2011) 129.

¹⁵⁹⁰ Henkel H 'Contesting Danish civility' (2011) 129.

¹⁵⁹¹ Henkel H 'Contesting Danish civility' (2011) 129.

Please see Jenkins R *Being Danish* (2012) 309.

¹⁵⁹² Henkel H 'Contesting Danish civility' (2011) 134.

¹⁵⁹³ Henkel H 'Contesting Danish civility' (2011) 134.

¹⁵⁹⁴ This concept came to light in ongoing discussions with a number of my Anthropology mentors including Professors Henkel, Sjørnslev and Vigh during my sojourn at Copenhagen University.

Danish government.¹⁵⁹⁵ It is my considered opinion that this is no different to the failure of the state to make a material difference in the lives of vulnerable groups in South Africa - it sends a powerful message to vulnerable groups in particular as to what in fact constitutes a pressing priority for the respective governments of Denmark and South Africa.

The cartoons were deemed to be particularly offensive as they managed to blend the derogatory portrayal of Muslims with a critical assault on the most respected figure in the Islamic world.¹⁵⁹⁶ Consequently, it is believed that the cartoons achieved iconic status 'in that they both represented Western non-recognition of Muslim sensibilities and dramatically performed this non-recognition'.¹⁵⁹⁷ The Muslims in Denmark were placed in an extremely difficult position, as they had to assume a position in the openly hostile debate concerning the cartoons, which entailed staking a claim as to the legitimacy of a Muslim identity in Denmark.¹⁵⁹⁸ Ultimately, the Muslims had to demonstrate that they could embrace a 'Danish' way of life.¹⁵⁹⁹ I am in complete agreement with the aforementioned insights by Henkel as it should be readily apparent that the cartoon crisis highlighted the vulnerability of Muslim immigrants and refugees as a minority group – this included being subjected to a constant barrage of hate speech yet being compelled to adhere to a course of (protest) action that did not put at risk the overarching goal for Muslim immigrants and refugees to be accepted as full/proper members of the Danish-state.

Henkel believes that there is a clear need for ethnic Danes and Muslims in Denmark to devise a blueprint through which they could consider and acknowledge each other's demands.¹⁶⁰⁰ Thus, an updated version of the *Kanslergade* Agreement of 1933 (as previously mentioned) is required

¹⁵⁹⁵ Henkel H 'Contesting Danish civility' (2011) 134.

¹⁵⁹⁶ Henkel H 'Contesting Danish civility' (2011) 134.

¹⁵⁹⁷ Henkel H 'Contesting Danish civility' (2011) 135.

Please see Sjørølev I 'The paradox of integration' (2011) 80.

¹⁵⁹⁸ Henkel H 'Contesting Danish civility' (2011) 135.

¹⁵⁹⁹ Henkel H 'Contesting Danish civility' (2011) 136.

¹⁶⁰⁰ Henkel H 'Contesting Danish civility' (2011) 136.

so as to ensure that mutual demands are properly recognised and embraced in the decades to come.¹⁶⁰¹ This will ensure that a Muslim can be recognised as a Muslim-Dane by the majority society in Denmark so as to enhance 'life chances' for Muslims as well as promote social solidarity for Danish society as a whole.¹⁶⁰²

A bitter irony which is evident is that Muslim minorities are subjected to extraordinary pressure to adhere to clearly defined versions of secularity which serves to undermine the stated Danish position of permitting every citizen to pursue their specific purposes and goals (and on which basis it assumes the supposed moral high ground).¹⁶⁰³ It is submitted that the South African Constitution is well suited to the task of forging social solidarity amongst people from all walks of life if the state exhibits the requisite political will and adheres to a suitable accountability standard in progressively giving effect to interdependent and interconnected civil, political and socio-economic rights.

It is indeed disappointing that a substantial part of Danish society has not drawn (or has elected not to draw) the critical distinction between freedom of speech (which is indeed capable of being limited) and hate speech as directed at a marginalised group in society. It follows that the drawing of the Muhammed cartoons were commissioned and subsequently published with the clear intention of causing grave offence to Muslim immigrants as well as to fan anti-Muslim sentiment. In conclusion, it serves to highlight the pressing need to celebrate diversity within our respective borders.

4.2.3.4 The troubling influence of right wing political parties in Denmark

It is necessary to have a clear understanding of the rise of the right wing in Denmark and the manner in which this has diminished the prospect of living lives of value on the part of a specific vulnerable group (i.e. Muslim immigrants and refugees). In this regard the right wing has sought to fan suspicion of Muslim immigrants and refugees ever being able to assume

¹⁶⁰¹ Henkel H 'Contesting Danish civility' (2011)146.

¹⁶⁰² Henkel H 'Contesting Danish civility' (2011)146.

¹⁶⁰³ Henkel H 'Contesting Danish civility' (2011)146.

a position in Denmark on an equal footing with ethnic Danes. Furthermore, this section serves as a warning for public officials in South Africa to put an end to blatant discrimination aimed at (specific) vulnerable groups by remaining committed to forging a constitutional democracy as envisaged by the Constitution. It follows that the aforementioned vision would encompass a just and caring nation (in which all members would be treated with equal concern and respect) and in which social solidarity ideals would flourish.¹⁶⁰⁴

A Ministry of Integration was established in 2001 by the newly-elected government which consisted of the Venstre Party and the Conservative Party but also required the support of the ultra-nationalist *danskfolkeparti* (Danish People's Party).¹⁶⁰⁵ The Danish People's Party has played a pivotal role in driving an anti-immigrant agenda which was seen to contribute to the Muhammed cartoon crisis.¹⁶⁰⁶ It assumed a prominent role in the wake of the 2001 general elections and ushered in an era in which stringent immigration laws and anti-Muslim rhetoric would take centre stage.¹⁶⁰⁷ The Danish People's Party had an extraordinary showing at the 2015 Danish election polls (consistent with its growing support base since the 2001 elections) which speaks volumes about the direction of mainstream politics in Denmark.¹⁶⁰⁸

The 'problem of integration' has evolved since 2001 in that the public discourse has assumed a narrower focus by specifically targeting Muslim immigrants in Denmark.¹⁶⁰⁹ By 2005 the anti-Islamic rhetoric in the media had intensified to the extent that Muslim immigrants were labelled as 'belonging to the Middle Ages', 'barbarians' and 'irreconcilable with Danish values'.¹⁶¹⁰ It should be noted that the Danish government has expressly articulated its assumption of the pivotal link

¹⁶⁰⁴ Please refer to the judgment in *Khosa* (2004) para 65.

¹⁶⁰⁵ Olwig KF & Paerregaard K "'Strangers' in the nation' (2011) 11.

¹⁶⁰⁶ Olwig KF & Paerregaard K "'Strangers' in the nation' (2011) 11.

¹⁶⁰⁷ Jöhncke S 'Integrating Denmark' (2011) 46.

¹⁶⁰⁸ Danish Election: 'Opposition bloc wins': <http://www.bbc.com/news/world-europe-33171549>, (accessed 17 June 2016).

¹⁶⁰⁹ Sjørlev I 'The paradox of integration' (2011) 80.

¹⁶¹⁰ Sjørlev I 'The paradox of integration' (2011) 80.

between participation in the labour market and the integration of immigrants.¹⁶¹¹ Thus, Bertel Haarder, the former Minister of Integration, stated in *Politiken* newspaper that:

‘Refugees (those that have recently gained asylum) have difficulties getting up in the morning. They simulate illness and get doctors to make false (sick) certificates. They are not at the disposal of the labour market. They should be put to work like skinning mink or looking after pigs, they don’t mind that. They must take the dirty, routine and poorly paid jobs. No work is too bad’.¹⁶¹²

The abovementioned quote highlights the ‘us-them’ dichotomy which is consistent with the blinkered views of the majority of Danes.¹⁶¹³ Furthermore, it displays deep-seated suspicions of the work ethic of immigrants as well as a blatant disregard for Muslim beliefs.¹⁶¹⁴

The Danish People’s Party has garnered international attention for its xenophobic utterances yet it has consistently sought to demonstrate its unwavering support for the Danish welfare state.¹⁶¹⁵ In this regard it is keen to emphasise its support for vulnerable groups such as the elderly while agitating for reduced support for large families (in the mistaken belief that immigrants comprise the majority of the target group).¹⁶¹⁶ This serves to highlight the manner in which the welfare system can be exploited to further a nationalist agenda.¹⁶¹⁷ Furthermore, *Sammenhaengskraft* (the power to hold together) has been utilised as a catchphrase by right wing parties in Denmark to conjure images of ‘cohesiveness’ in the public discourse regarding the welfare state and immigrants (or more specifically the threats posed by the immigrants).¹⁶¹⁸ Thus, it is both ironic and deeply troubling that the true

¹⁶¹¹ Sjørlev I ‘The paradox of integration’ (2011) 80.

¹⁶¹² *Politiken* (Newspaper) 7 October 2003.

¹⁶¹³ Sjørlev I ‘The paradox of integration’ (2011) 80.

¹⁶¹⁴ Sjørlev I ‘The paradox of integration’ (2011) 80.

¹⁶¹⁵ Jöhncke S ‘Integrating Denmark’ (2011) 32.

¹⁶¹⁶ Jöhncke S ‘Integrating Denmark’ (2011) 32.

¹⁶¹⁷ Jöhncke S ‘Integrating Denmark’ (2011) 32.

¹⁶¹⁸ Rubow C ‘Religion and integration’ (2011) 110.

nature of social solidarity (in standing together regardless of our perceived differences as we are ultimately not all that different) has been cast aside in contemporary (mainstream) political discourse in Denmark.¹⁶¹⁹

It is submitted that this is the lived reality of Muslim immigrants and refugees in contemporary Denmark. This in turn provides telling insights as to the manner in which the state should actively guard against adding to the burden endured by vulnerable groups in South Africa through forging an enlightened (and all-encompassing) understanding of social solidarity.

4.2.3.5 The inclusion and exclusion of specific groups in contemporary Denmark

The concepts of inclusion and exclusion (as detailed in this section) are deployed so as to frame debates/discourse in a manner which routinely exclude Muslim refugees and immigrants when reference is made to (full) members of the social welfare state of Denmark. It is submitted that it is critical to develop an intimate understanding of inclusion and exclusion if the goal is to safeguard the legitimate expectations of vulnerable groups whether in Denmark or South Africa. It should be noted that the deployment of the communal obligations' focus of ubuntu is as a rule inclusive in nature and consequently seeks to acknowledge and address the urgent needs of fellow (vulnerable) members of society.

It should be noted that the prevalent understanding of integration in Denmark (in which new pieces are meshed with the pre-existing fully formed whole as previously indicated) is decidedly different from integration as understood in the social sciences which is one of how a society 'is held together'.¹⁶²⁰ This latter version entails an exploration of how a specific society was fashioned and the social mechanisms which

¹⁶¹⁹ Rubow C 'Religion and integration' (2011) 110.

¹⁶²⁰ Jöhncke S 'Integrating Denmark' (2011) 33.

make that very society able to perform and achieve a measure of durability.¹⁶²¹

There is a definitive link between the way in which present day Danish society is formulated and its development (over an extended period of time) as a welfare state.¹⁶²² A central theme in the Danish welfare state is that the goods of a society should be distributed for the benefit of all and as a means of promoting widespread equality.¹⁶²³ The assumed differences between people are negligible (even if people present with a variety of needs and demonstrate a range of capabilities) and will be of no consequence if everyone contributes to the commonwealth as people 'are, fundamentally, alike' as previously described.¹⁶²⁴ However, this belief in equality and equivalence is linked to the unwavering belief of Denmark as a culturally homogenous society.¹⁶²⁵ Therefore, it is only applied as a rule to ethnically Danish people.¹⁶²⁶

This in turn has shaped a widely held belief amongst ethnically Danish people that only they (as opposed to immigrants and refugees) can fully comprehend (as well as appreciate) the rights and duties which flow from being a critical component of the Danish welfare system.¹⁶²⁷ Immigrants and refugees are consequently labelled as being substantially different (in terms of their culture, financial status and education levels) so as to effectively undermine their ability to make a meaningful and sustained contribution to a welfare society which requires perpetual redistribution of goods.¹⁶²⁸ This results in the stigmatisation of immigrants and refugees as (supposedly) exploiting the resources of the welfare state without making a contribution to it.¹⁶²⁹ However, it is an entirely different

¹⁶²¹ Jöhncke S 'Integrating Denmark' (2011) 33.

¹⁶²² Olwig KF & Paerregaard K "'Strangers' in the nation' (2011) 17.

¹⁶²³ Olwig KF & Paerregaard K "'Strangers' in the nation' (2011) 17.

¹⁶²⁴ Olwig KF & Paerregaard K "'Strangers' in the nation' (2011) 17.

¹⁶²⁵ Olwig KF & Paerregaard K "'Strangers' in the nation' (2011) 17.

¹⁶²⁶ Olwig KF & Paerregaard K "'Strangers' in the nation' (2011) 17.

¹⁶²⁷ Olwig KF & Paerregaard K "'Strangers' in the nation' (2011) 17. Please see Sjørøsløv I 'The paradox of integration' (2011) 80.

¹⁶²⁸ Olwig KF & Paerregaard K "'Strangers' in the nation' (2011) 17.

¹⁶²⁹ Olwig KF & Paerregaard K "'Strangers' in the nation' (2011) 17.

matter whether there is any actual evidence to support these damning allegations.¹⁶³⁰

Nonetheless, there is a need to draw a distinction between the process of *integrating* and the state of *integratedness* with the latter describing the specific extent of transformation in a given society.¹⁶³¹ It is submitted that this section of the work is capable of providing public officials with critical insight as to whether the conditions on the ground (i.e. the political landscape) are conducive for shaping a sustainable social solidarity project by virtue of the legitimate concerns of specific vulnerable groups receiving the necessary acknowledgment and support. Furthermore, integration is possessed of a normative element as it is perceived as a socially desirable aim which depicts harmony and agreement amongst members of a given society.¹⁶³² In addition, integration encompasses the concepts of coherence and cohesion.¹⁶³³ Coherence is comprised of the complex social relations between the members of a society whilst cohesion colours those same social relations with meaning so as to bring about enduring social relations.¹⁶³⁴ This is in keeping with a key focus in this thesis, in pursuing a sustainable version of social solidarity in South Africa, through the progressive realisation of critical subsistence rights of vulnerable groups as a means to demonstrate that all citizens have equal worth.

Immigrants in Denmark who strive to be recognised as being fully integrated have the unenviable task of not only 'feeling Danish' but must also 'do Danish' by faithfully adhering to a myriad of demands as prescribed by the welfare state.¹⁶³⁵ This seems to indicate that the concept of 'integration' is not defined with the requisite clarity to render it suitable for analysis.¹⁶³⁶ Furthermore, it is not possible to reduce the

¹⁶³⁰ Olwig KF & Paerregaard K "Strangers" in the nation' (2011) 17.

¹⁶³¹ Jöhncke S 'Integrating Denmark' (2011) 33.

¹⁶³² Jöhncke S 'Integrating Denmark' (2011) 34.

¹⁶³³ Jöhncke S 'Integrating Denmark' (2011) 34.

¹⁶³⁴ Jöhncke S 'Integrating Denmark' (2011) 34.

¹⁶³⁵ Jöhncke S 'Integrating Denmark' (2011) 35.

¹⁶³⁶ Jöhncke S 'Integrating Denmark' (2011) 35.

question of integration to an 'either-or' as it would be simplistic in the extreme to depict a society as either integrated or not integrated.¹⁶³⁷ It is for the aforementioned reasons that Luhmann sought to discard the concept of integration and instead focussed on inclusion and exclusion in a variety of social systems (e.g. the education sector as well as the labour market).¹⁶³⁸ This was due to there being no single constituted 'society' as such but rather different social systems characterised by clear forms of communication and exchange mechanisms.¹⁶³⁹ Thus, inclusion and exclusion are viewed as 'simultaneous and mutually dependent processes' and seek to shed light on how in practice individuals and groups are included and excluded from engaging in give-and-take processes in a specific social system.¹⁶⁴⁰

The abovementioned approach has a distinct advantage when analysing integration as it highlights the manner in which policies (that are deemed to advance integration) are just as likely to exclude individuals and groups while catering for inclusion by merely framing 'integration problems' and their solutions in particular ways.¹⁶⁴¹ It is submitted that the aforementioned approach promotes a better understanding of the specific circumstances of vulnerable groups. This echoes the sentiments of Praeg who had noted the existence of power relations that dictated which people were allowed to be part of the conversation.¹⁶⁴² In addition, it is interesting to contemplate the concepts of inclusion and exclusion as related to the plight of specific vulnerable groups in South Africa (e.g. the manner in which desperate, homeless people in the *Grootboom* matter were *excluded* from the state housing programme in the Western Cape).

¹⁶³⁷ Jöhncke S 'Integrating Denmark' (2011) 35.

¹⁶³⁸ Luhmann N 'Die Gesellschaft der Gesellschaft' Vol 2. *Frankfurt am Main: Suhrkamp* (1997) 619-621 (hereafter *Die Gesellschaft der Gesellschaft*) 619.

¹⁶³⁹ Luhmann N 'Die Gesellschaft der Gesellschaft' (1997) 619.

¹⁶⁴⁰ Jöhncke S 'Integrating Denmark' (2011) 35.

¹⁶⁴¹ Jöhncke S 'Integrating Denmark' (2011) 35.

¹⁶⁴² Praeg L *Report on Ubuntu* (2014) 8.

Political parties across the full spectrum have recognised that the Danish welfare state is a permanent fixture even though amendments (to specific welfare benefits and/or conditions) are enacted from time to time.¹⁶⁴³ This unwavering support for the welfare state is seen as a manifestation of the extent to which social solidarity, as an ideal encompassing the belief that 'we are all in the same boat', resonates with Danes.¹⁶⁴⁴ Consequently, the general sentiment (from a Danish perspective) towards the welfare state is that of a compelling social construction (and a notable political achievement) that has made a crucial contribution in shaping an integrated society.¹⁶⁴⁵

It is difficult to resist the temptation to contrast the social construction of the Danish welfare state (and its vast social security net) with the ushering in of a new dawn in South Africa in which the Constitution (with its entrenched socio-economic rights provisions) serves as a beacon of light in bringing about a united nation premised on a firm belief that all people have equal worth. It is submitted that the concept of 'equal worth' encompasses an obligation on the part of the state to prioritise the systematic dismantling of the deprivation endured by vulnerable groups (so as to shape a just and caring nation-state). Thus, the related contribution by Bowler *et al*¹⁶⁴⁶ in re-imagining and/or re-inventing South Africa as a sanctuary for all who reside within its borders is of considerable academic interest as well as a compelling human interest story.

Social class remains a reality in contemporary Denmark (as there is a limit to the extent of redistribution that is possible within society) and there are accordingly extremely poor and exceedingly wealthy people separated by a huge middle class.¹⁶⁴⁷ Furthermore, the poorest/most marginalised grouping in Danish society has a disproportionately large

¹⁶⁴³ Jöhncke S 'Integrating Denmark' (2011) 41.

¹⁶⁴⁴ Jöhncke S 'Integrating Denmark' (2011) 41.

¹⁶⁴⁵ Jöhncke S 'Integrating Denmark' (2011) 42.

¹⁶⁴⁶ Please see Section 4.3 for a discussion of Social Solidarity in South Africa.

¹⁶⁴⁷ Jöhncke S 'Integrating Denmark' (2011) 44.

number of people from ethnic minorities.¹⁶⁴⁸ Thus, the 'ideologies of harmony' finds application in the Danish welfare state in that the faith displayed in consensus was borne out by the middle class (that routinely benefitted from the welfare state) whilst simultaneously ensuring that all talk of class differences was drowned out.¹⁶⁴⁹

The Danish parliament had passed social policy legislation which sought to reduce tangible benefits for certain immigrant individuals and their families as a means of lessening the appeal of Denmark for non-working immigrants.¹⁶⁵⁰ The 'introduction benefit' and 'start assistance' provided immigrants with cash relief at significantly reduced levels in contrast to benefits provided to Danes.¹⁶⁵¹ It was of grave concern that both of the aforementioned benefits fell below the official EU poverty level but were vigorously defended by the state on the basis of 'giving incentives to immigrants to start working and becoming integrated into Danish society'.¹⁶⁵² This is in itself a tragic indictment on the part of the state in reinforcing prejudicial beliefs about the (supposed) lack of work ethic on the part of immigrants and refugees - especially in the absence of taking into account the reciprocal responsibilities of Denmark as the receiving society with regards to facilitating integration.¹⁶⁵³ It follows that the Danish welfare state 'is not just a piece of social and economic engineering but it is in fact a project of cultural construction of social relations and values'.¹⁶⁵⁴

It is believed that the contemporary challenge is to find a way to give expression to the rallying call 'Denmark for the Inhabitants' as a means of ensuring tangible benefits for every person in Denmark.¹⁶⁵⁵ In the same vein a rallying call 'South Africa for the Inhabitants' can indeed

¹⁶⁴⁸ Jöhncke S 'Integrating Denmark' (2011) 44. Please see Brand D 'What Are Socio-Economic Rights For?' (2003) 35 for illuminating insights as to the harsh deprivation endured by vulnerable groups.

¹⁶⁴⁹ Jöhncke S 'Integrating Denmark' (2011) 46.

¹⁶⁵⁰ Jöhncke S 'Integrating Denmark' (2011) 48.

¹⁶⁵¹ Jöhncke S 'Integrating Denmark' (2011) 48.

¹⁶⁵² Jöhncke S 'Integrating Denmark' (2011) 48.

¹⁶⁵³ Jöhncke S 'Integrating Denmark' (2011) 48.

¹⁶⁵⁴ Jöhncke S 'Integrating Denmark' (2011) 49.

¹⁶⁵⁵ Jöhncke S 'Integrating Denmark' (2011) 49.

become a reality. That is, if diligent public officials (who are primed to give effect to the communal obligations' focus of ubuntu) demonstrate an unwavering focus on the progressive realisation of socio-economic rights as enshrined in the Constitution.

It should be noted that the damaging perception of immigrants and refugees as a problem group is emphasised by the widespread belief that Denmark is a culturally homogenous national community as previously indicated.¹⁶⁵⁶ This belief is strengthened by the frequent use of kin images such as 'the family of Denmark' when referring to Danish society.¹⁶⁵⁷ The adoption of the aforementioned kin images by Danes serves to make an unequivocal statement about the need for 'shared blood ties and biological descent' as mandatory requirements prior to staking a legitimate claim to a Danish national identity and enjoying full membership in society.¹⁶⁵⁸ Thus, the idea that immigrants and refugees are required to join the family of Denmark (through marital and kin bonds grounded in Denmark) has played a pivotal role in the passing of laws to enforce tougher restrictions on the rights to marry a spouse from their country of origin.¹⁶⁵⁹ The discriminatory effect of the aforementioned laws are (somewhat) concealed in the neutral language which is employed in detailing the period of residence in Denmark as well as the national affiliation of immigrants and refugees.¹⁶⁶⁰ Thus, the Danish immigration regime makes it difficult for foreigners as well as Danish citizens (especially those with immigrant roots) to secure family reunification with non-European spouses.¹⁶⁶¹

The relevant legislation (as related to family reunification) served three specific purposes.¹⁶⁶² Firstly, it sought to impede transnational arranged

¹⁶⁵⁶ Olwig KF & Paerregaard K "'Strangers" in the nation' (2011) 17.

¹⁶⁵⁷ Olwig KF & Paerregaard K "'Strangers" in the nation' (2011) 17.

¹⁶⁵⁸ Olwig KF & Paerregaard K "'Strangers" in the nation' (2011) 17.

¹⁶⁵⁹ Olwig KF & Paerregaard K "'Strangers" in the nation' (2011) 17.

¹⁶⁶⁰ Olwig KF & Paerregaard K "'Strangers" in the nation' (2011) 17.

¹⁶⁶¹ Rytter M "'The Family of Denmark" and "the Aliens": Kinship Images in Danish Integration Politics' in Olwig KF & Paerregaard K (eds) *The Question of Integration: Immigration, Exclusion and the Danish Welfare State* (2011) 54 (hereafter *The Family of Denmark*).

¹⁶⁶² Rytter M 'The Family of Denmark' (2011) 54.

marriages amongst Turkish and Pakistani immigrants.¹⁶⁶³ Secondly, it was aimed at bolstering security in the aftermath of the September 2001 attacks by restricting the flow of non-European immigrants (with a specific focus on keeping Muslim immigrants at bay).¹⁶⁶⁴ Finally, it was believed that the twinning of the abovementioned objectives would facilitate the improved integration of immigrants and refugees that were already settled in Denmark.¹⁶⁶⁵ In addition, five conditions were introduced with regard to securing family reunification including age, accommodation, financial assistance, collateral and national attachment (i.e. the ambit of the relevant law was widened to include Danish citizens that sought to marry foreign spouses as opposed to [previously] only being applicable to foreigners living in Denmark).¹⁶⁶⁶

The abovementioned requirement as related to national attachment, which is of particular interest in exploring the contemporary Danish welfare state, is calculated by the immigration authorities making a determination as to 'whether the total national attachment of a married couple consisting of a Dane and a foreign spouse is greater to Denmark than to any other country'.¹⁶⁶⁷ The national attachment requirement is of concern as a distinction is drawn between the majority of 'authentic' Danes and the minority of 'not-quite-real' Danes.¹⁶⁶⁸ The aforementioned 'not-quite-real' Danes are comprised of immigrants and refugees (as well as their respective descendants) who have made Denmark their home and secured citizenship in the past 50 years or so.¹⁶⁶⁹

The abovementioned requirement of national attachment has cast aside the previously sacred practice that all Danes are equal before the

¹⁶⁶³ Rytter M 'The Family of Denmark' (2011) 54.

¹⁶⁶⁴ Rytter M 'The Family of Denmark' (2011) 71.

¹⁶⁶⁵ Rytter M 'The Family of Denmark' (2011) 71.

¹⁶⁶⁶ Rytter M 'The Family of Denmark' (2011) 71.

¹⁶⁶⁷ Rytter M 'The Family of Denmark' (2011) 55.

¹⁶⁶⁸ Rytter M 'The Family of Denmark' (2011) 55. Please see Sjørslev I 'The paradox of integration' (2011) 80.

¹⁶⁶⁹ Rytter M 'The Family of Denmark' (2011) 55. Please see Sjørslev I 'The paradox of integration' (2011) 80.

law.¹⁶⁷⁰ Danish citizens with parents born elsewhere find it exceptionally difficult to meet the requirement of national attachment as they have no family ties going back a number of generations.¹⁶⁷¹ The obvious inference drawn from giving effect to the notion of national attachment is that there is a 'disparity between the Danish nation and Danish citizens' as Danish citizens of immigrant origin are not perceived as 'real' Danes.¹⁶⁷² In this regard kinship images have been ushered in which exclude certain Danish citizens without good cause by utilising a valid legal principle (i.e. the requirement of national attachment).¹⁶⁷³ It is submitted that laws which are seemingly neutral but ultimately create a hierarchy amongst (equal) members of a society will sow division and undermine any social solidarity project aimed at recognising and addressing the legitimate concerns and needs of all members of society.

Furthermore, it serves to highlight that one cannot dismiss the lingering notion that certain citizens have 'more rights to and ownership of the benefits of the welfare state than others' by virtue of their 'natural' ties to the Danish nation.¹⁶⁷⁴ The national attachment requirement also points to a contemporary focus on 'ethnic nationalism' by the Danish welfare state (i.e. an emphasis on hierarchical and exclusionist tendencies) as opposed to previously advocating 'civic nationalism' which promoted egalitarianism and inclusion in public and political discourse in Denmark.¹⁶⁷⁵ The aforementioned 'ethnic nationalism' focus of the Danish state is of extreme concern in light of the manner in which the plight of vulnerable groups will in all likelihood have to endure the dismissal of legitimate concerns as well as increasing isolation.

It is fair comment that a clear majority of Danes support the strict immigration regime.¹⁶⁷⁶ However, the European Court of Justice had

¹⁶⁷⁰ Rytter M 'The Family of Denmark' (2011) 57.

¹⁶⁷¹ Rytter M 'The Family of Denmark' (2011) 59.

¹⁶⁷² Rytter M 'The Family of Denmark' (2011) 57. Please see Sjørslev I 'The paradox of integration' (2011) 80.

¹⁶⁷³ Rytter M 'The Family of Denmark' (2011) 60.

¹⁶⁷⁴ Rytter M 'The Family of Denmark' (2011) 60.

¹⁶⁷⁵ Rytter M 'The Family of Denmark' (2011) 64.

¹⁶⁷⁶ Rytter M 'The Family of Denmark' (2011) 60.

previously raised concerns in *Metock*¹⁶⁷⁷ about the Danish immigration regime which was viewed as impeding the free movement of labour within the European Union due to its onerous legislation in relation to family re-unification.¹⁶⁷⁸

Furthermore, Sjorslev¹⁶⁷⁹ explores the critical role of grammar in the public debate on immigrants and refugees in the Danish welfare state.¹⁶⁸⁰ Specific categories of 'social inequality' and 'cultural difference' have become so embedded in present day Danish language that they come across as 'natural' in everyday life.¹⁶⁸¹ An interesting comparison is drawn with the German/Nazi society in the 1930s in that the current public debate on immigrants and refugees in Denmark mimics the vocabulary used by the Nazis to promote social exclusion not only in speech but also in practice.¹⁶⁸² The 'Final Solution' as proposed by the Nazi regime will be discussed in due course through a brief exploration of the work of Hannah Arendt.¹⁶⁸³

Sjorslev rejects integration as an analytical term and proposes that an overarching (abstract) view of the numerous political consequences of integration (in the relevant social and political context) should be pursued.¹⁶⁸⁴ It is persuasively argued that cultural constructions are not only indicative of the lived reality but also actively shape the formation of specific social orders.¹⁶⁸⁵ However, the particular manner in which these cultural constructions are analysed or find application can differ significantly.¹⁶⁸⁶ Consequently, this makes it possible for most Danes to affirm that Denmark is culturally homogenous as the definitive meaning of cultural homogeneity is hardly ever fully articulated but for a routine

¹⁶⁷⁷ *Metock v Minister for Justice, Equality and Law Reform* European Court of Justice C-127/08 (2008).

¹⁶⁷⁸ Rytter M 'The Family of Denmark' (2011) 70.

¹⁶⁷⁹ Professor Inger Sjorslev was one of my primary mentors during my sojourn at the University of Copenhagen in 2015.

¹⁶⁸⁰ Olwig KF & Paerregaard K "'Strangers' in the nation' (2011) 18.

¹⁶⁸¹ Olwig KF & Paerregaard K "'Strangers' in the nation' (2011) 18.

¹⁶⁸² Olwig KF & Paerregaard K "'Strangers' in the nation' (2011) 18.

¹⁶⁸³ Please see Section 5.3.

¹⁶⁸⁴ Olwig KF & Paerregaard K "'Strangers' in the nation' (2011) 18.

¹⁶⁸⁵ Olwig KF & Paerregaard K "'Strangers' in the nation' (2011) 18.

¹⁶⁸⁶ Olwig KF & Paerregaard K "'Strangers' in the nation' (2011) 18.

reference to a shared ethnic background.¹⁶⁸⁷ Thus, integration is not a neutral concept as Danish debates over the past few decades bear witness to an extremely politicised field encapsulating the ideas and conduct covered by the aforementioned concept.¹⁶⁸⁸

A case in point is the manner in which the concept of integration has morphed in Denmark over time with specific reference to the contemporary discourse pertaining to Muslim immigrants.¹⁶⁸⁹ It is necessary to emphasise that it is not being suggested that the shift in the meaning of key concepts will inevitably spark a dangerous series of events.¹⁶⁹⁰ However, negative consequences are inevitable.¹⁶⁹¹ There is indeed a legitimate concern that the meaning and intention of crucial concepts will be rendered difficult to define with any degree of precision.¹⁶⁹² Thus, there is consequently a distinct possibility that the 'paradox of integration' may be portrayed as a noteworthy and positive concept yet it could be deployed to specifically exclude a target group (e.g. Muslim immigrants).¹⁶⁹³ The Danish cultural values that make the 'paradox of integration' possible is referred to as 'heavy culture' which are defined as cultural models that profoundly influence thinking and values in largely unseen ways.¹⁶⁹⁴ In addition, the notion that equality connotes sameness has extraordinary significance in Scandinavia.¹⁶⁹⁵ Thus, there is a firmly rooted Danish notion of a suitably enhanced inner core that serves as the point of origin for democratic and egalitarian values which truly capture Danishness¹⁶⁹⁶ (and which immigrants are meant to imbibe so as to become fully integrated).¹⁶⁹⁷

¹⁶⁸⁷ Olwig KF & Paerregaard K "'Strangers" in the nation' (2011) 18.

¹⁶⁸⁸ Sjørsløv I 'The paradox of integration' (2011) 78.

¹⁶⁸⁹ Sjørsløv I 'The paradox of integration' (2011) 78. Please see Jenkins R *Being Danish* (2012) 309.

¹⁶⁹⁰ Sjørsløv I 'The paradox of integration' (2011) 78.

¹⁶⁹¹ Sjørsløv I 'The paradox of integration' (2011) 78.

¹⁶⁹² Sjørsløv I 'The paradox of integration' (2011) 78.

¹⁶⁹³ Sjørsløv I 'The paradox of integration' (2011) 78.

¹⁶⁹⁴ Sjørsløv I 'The paradox of integration' (2011) 78.

¹⁶⁹⁵ Sjørsløv I 'The paradox of integration' (2011) 78.

¹⁶⁹⁶ Please refer to the brief discussion with reference to Hal Koch at Section 4.2.3.2.

¹⁶⁹⁷ Sjørsløv I 'The paradox of integration' (2011) 78.

It is submitted that the aforementioned notion of a 'suitably enhanced inner core' is of extreme concern as it provides a seemingly innocent perspective on the values endorsed by all (proper) Danes. However, it deliberately excludes specific vulnerable groups on the basis of perceived differences which negatively impacts the ability of members (of those same vulnerable groups) to affirm their status as citizens of equal standing. In this regard Foucault offers a penetrating insight concerning discourse in which knowledge is comprised of 'social praxis, forms of subjectivity and power relations'.¹⁶⁹⁸ Thus, Foucault believes that discourses 'are forms of power that circulate in a social field'.¹⁶⁹⁹ I am in complete agreement with the aforementioned insights (as offered by Foucault) as the dominant public discourse in Denmark primarily casts light on the myopic (and often xenophobic) views of ethnic Danes.

It follows that integration can be viewed as a 'heavy' concept as per the previous description offered by Sjørslev.¹⁷⁰⁰ In this regard it is apt to refer to the double-bind as described by Bateson in which he mused that: 'You are not ready to become integrated until you are like us, and you will not prove that you are like us until you are integrated'.¹⁷⁰¹ This illustrates the seemingly impossible dilemma faced by Muslim immigrants and refugees that are keen to assume their rightful place in Danish society (i.e. to be on an equal footing with ethnic Danish citizens).¹⁷⁰² Consequently, the grammar of encompassment finds application in the current context where a certain group deems a different group to be basically 'like us' but have yet to be so transformed.¹⁷⁰³ Furthermore, dichotomous grammar is also on display in that a certain group makes a marked distinction between themselves and another group which is best described as 'us-them'.¹⁷⁰⁴

¹⁶⁹⁸ Foucault M *Talens forfatning* (1970).

¹⁶⁹⁹ Foucault M *Talens forfatning* (1970).

¹⁷⁰⁰ Sjørslev I 'The paradox of integration' (2011) 79.

¹⁷⁰¹ Bateson G *Steps to an Ecology of Mind* (1972).

¹⁷⁰² Sjørslev I 'The paradox of integration' (2011) 83.

¹⁷⁰³ Sjørslev I 'The paradox of integration' (2011) 83.

¹⁷⁰⁴ Sjørslev I 'The paradox of integration' (2011) 83.

However, it is important to grasp that the ideology of immigration in Denmark is underpinned by two implicit, resolute beliefs which is related to 'heavy culture' as previously discussed.¹⁷⁰⁵ Firstly, there is the belief that there is something of substance into which the immigrant must be integrated.¹⁷⁰⁶ Secondly, there is a distinct dividing line between 'us' (i.e. ethnic Danes) and 'them' (i.e. Danish immigrants).¹⁷⁰⁷ The aforementioned (twin) insights portray a disturbing lived reality in that refugees and immigrants in Denmark are treated as second class citizens - the aforementioned abhorrent treatment is for all intents and purposes endorsed by the state through failing to come to the aid of vulnerable groups so as to create a platform for all members to pursue lives of value.

The abovementioned (implicit) beliefs have fundamentally shaped the public discourse regarding integration/immigration in Denmark and is assumed to be self-evident on the part of the majority of Danes.¹⁷⁰⁸ Thus, integration is imagined as *being* rather than *acting*.¹⁷⁰⁹ Furthermore, current conceptions of what it means to be Danish (as shaped by common values and a strong inner constitution) plays a pivotal role in shaping the public discourse concerning real Danish culture and perceived threats against it.¹⁷¹⁰ It follows that this complicates the possibility of integration if the process is shaped by inner values rather than by simply observing the laws of the land.¹⁷¹¹ In this regard the previous description of the work by Hal Koch (as related to the core values of Danish citizens) deserves a special mention in that the state could routinely discriminate against refugees and immigrants as not possessing the requisite inner core which resonates with Danish values. It follows that this would make it virtually impossible for refugees

¹⁷⁰⁵ Sjørsløv I 'The paradox of integration' (2011) 83.

¹⁷⁰⁶ Sjørsløv I 'The paradox of integration' (2011) 83.

¹⁷⁰⁷ Sjørsløv I 'The paradox of integration' (2011) 83. Please see Jenkins R *Being Danish* (2012) 309. Please also see Coertze RD 'Ubuntu and nation building' *South African Journal of Ethnology* 24(4) (2001) 115.

¹⁷⁰⁸ Sjørsløv I 'The paradox of integration' (2011) 83.

¹⁷⁰⁹ Sjørsløv I 'The paradox of integration' (2011) 83.

¹⁷¹⁰ Sjørsløv I 'The paradox of integration' (2011) 88.

¹⁷¹¹ Sjørsløv I 'The paradox of integration' (2011) 88.

and immigrants to assume a place in society on an equal footing with ethnic Danes.

It is indeed necessary to explore the power of language in the South African context so that the feel-good, vacuous claims of ubuntu are discarded and replaced with an unwavering commitment to prioritise communal obligations as a political choice. Furthermore, concepts that are routinely utilised by the state such as the 'boundless forgiveness of ubuntu', 'scarce resources' and 'sharing of obligations' (without the attendant concept of 'sharing of resources' in the context of progressively giving effect to socio-economic rights) should be interrogated in light of the abovementioned contribution by Sjørlev (and Foucault) regarding the power of language and dominant political discourses respectively.

The Danish people are viewed as the founding members of contemporary Danish society and therefore treated as the proprietors of the country (which is indicative of the entitlement developed over a history spanning the past three centuries).¹⁷¹² A dual configuration of *demos* (all citizens) and *ethnos* (everyone of Danish descent) exacts a moral obligation to engage in society on both 'older' and 'newer' members of Danish society but the nature and extent of the participation is dependent upon whether you are an 'older' or 'newer' member.¹⁷¹³ Research (regrettably) demonstrates that the best efforts on the part of immigrants to 'do as Danes' is either ignored or alternatively rejected.¹⁷¹⁴ Immigrants are never 'quite right' or 'quite enough'.¹⁷¹⁵

However, Jenkins registers hope in the belief that Danes and immigrants will find a way to live together in relative harmony by giving in to 'the

¹⁷¹² Anderson S 'The obligation to participate: micro-integrative processes of civil sociality' in Olwig KF & Paerregaard K (eds) *The Question of Integration: Immigration, Exclusion and the Danish Welfare State* (2011) 231 (hereafter The obligation to participate).

¹⁷¹³ Anderson S 'The obligation to participate' (2011) 231.

¹⁷¹⁴ Anderson S 'The obligation to participate' (2011) 253.

¹⁷¹⁵ Anderson S 'The obligation to participate' (2011) 253.

pragmatics of Danish everyday life over time'.¹⁷¹⁶ This is despite the current 'us-them' conflict which has been brought about by an increased demand on the part of Danes for immigrants to 'integrate'.¹⁷¹⁷ In this regard Jenkins believes that 'Danish Culture' and Danishness are 'not endangered species' which require protection by the state as they are 'moving, ever-changing and complex ways of life'.¹⁷¹⁸

Furthermore, Grillo asserts that the integration of both citizens and foreigners into a specific society are as 'vague and fuzzy' in other countries (such as Britain) as compared to the lived experience in Denmark.¹⁷¹⁹ However, the ideal of integration has a special resonance within the Scandinavian territories due to the intimate and powerful link between the notions of sameness and equality.¹⁷²⁰

4.2.3.6 Summary

The critical role of the dominant political discourse in shaping society should be acknowledged. Furthermore, integration and social solidarity are seemingly linked in perpetuity in the Danish political landscape. It is critical that the concept of social solidarity should not be confined to an expression of 'sameness' – social solidarity should instead encompass how differences amongst people can be accommodated in an enlightened understanding of what constitutes a Danish citizen in the era of globalisation.

It is consequently of considerable interest to note that 'ethnic Danes' define people as belonging to their nation through pragmatic observance which is characterised by learning to speak Danish, respecting the law and self-identification (in relation to citizenship and feeling that one is at home in the country).¹⁷²¹ It follows that the aforementioned model of

¹⁷¹⁶ Jenkins R 'Integration of the folk and by the folk' in Olwig KF & Paerregaard (eds) *The Question of Integration: Immigration, Exclusion and the Danish Welfare State* (2011) 264 (hereafter *Integration of the folk*).

¹⁷¹⁷ Jenkins R 'Integration of the folk' (2011) 264.

¹⁷¹⁸ Jenkins R 'Integration of the folk' (2011) 264.

¹⁷¹⁹ Olwig KF & Paerregaard K "'Strangers" in the nation' (2011) 23.

¹⁷²⁰ Olwig KF & Paerregaard K "'Strangers" in the nation' (2011) 23.

¹⁷²¹ Jenkins R *Being Danish* (2012) 310.

collective identification does not require exclusive homogeneity and highlights that it is possible to imagine a future in which 'non-coercive mutual adjustment and accommodation is possible' if the politics is favourable.¹⁷²² The aforementioned insights concerning collective identification provide critical insight into key factors that should be considered in devising and implementing a (*pluricultural*) nation-building project in South Africa as discussed below.

It is submitted that celebrating/embracing differences amongst citizens should feature prominently in contemporary public discourse in Denmark as a means to reverse the tide against prevalent exclusionist and xenophobic tendencies. It is further submitted that a society which sets the membership bar at the appropriate level as previously discussed (i.e. in ensuring that there is a common understanding amongst all members as to the minimum conditions required to create a society predicated upon sustainable social solidarity principles) provides a critical insight as to shaping a new tomorrow, for one and all, whether it be in Denmark or South Africa.

4.3 The manner in which social solidarity is understood and embraced in South Africa

4.3.1 Introduction

Bowler endorses the view of Praeg in which the logic of interdependence is deemed central to the concept of a constituted community.¹⁷²³ This has expanded from precolonial communities (which could be viewed as the first instance) to encapsulating the community of the nation-state that is South Africa (which could be viewed as the contemporary instance).¹⁷²⁴ Thus, ubuntu is viewed as informing the 'post-apartheid national project' in a manner which has provided us with an alternative (but most welcome) 'translation of sameness'.¹⁷²⁵ The shift to the

¹⁷²² Jenkins R *Being Danish* (2012) 310.

¹⁷²³ Bowler DA 'Concluding Reflections' (2014) 201.

¹⁷²⁴ Bowler DA 'Concluding Reflections' (2014) 201.

¹⁷²⁵ Bowler DA 'Concluding Reflections' (2014) 201. Please see Coertze RD 'Ubuntu and nation building' *South African Journal of Ethnology* 24(4) (2001) 115.

imagined community of the South African nation in the present time is indicative of an attempt to shift ubuntu 'from its precolonial habitus to a postcolonial habitus'.¹⁷²⁶ The aforementioned shift is predicated on a belief that the transcendental element of ubuntu can shape/forged a united South Africa.¹⁷²⁷ In this regard the jurisprudence of the Constitutional Court has highlighted the definitive link between ubuntu and social solidarity in that ubuntu fosters closeness, understanding and mutual support amongst people.¹⁷²⁸ Thus, giving effect to ubuntu could serve as an extraordinary and unique catalyst for social harmony.¹⁷²⁹

Justice Mokgoro rightly contends that:

'ubuntu values of collective unity and group solidarity are translated into the value of national unity demanded by the new South African society. The collective unity, group solidarity, and conformity tendencies of ubuntu can promote a new patriotism and personal stewardship crucial to the development of a democratic society'.¹⁷³⁰

The aforementioned concept of 'personal stewardship' dovetails neatly with the view advanced in this thesis that public officials who embrace the communal obligations' focus of ubuntu will execute their duties in a manner which will make a meaningful contribution to ease the suffering of vulnerable groups. This would in turn lay the foundation in forging a united nation-state in which all people are treated with equal respect.

In addition, Justice Mokgoro is viewed as supporting an approach to building democracy by shaping 'a new shared public world' in which every voice is heard and no group is cast to the periphery.¹⁷³¹ In this regard the anthropological discussion (with regards to inclusion and exclusion¹⁷³²) is of specific relevance in relation to which voices are in

¹⁷²⁶ Bowler DA 'Concluding Reflections' (2014) 204.

¹⁷²⁷ Bowler DA 'Concluding Reflections' (2014) 204.

¹⁷²⁸ Bowler DA 'Concluding Reflections' (2014) 204.

¹⁷²⁹ Bowler DA 'Concluding Reflections' (2014) 204.

¹⁷³⁰ Mokgoro Y 'Ubuntu and the Law in South Africa' (1997) 320.

¹⁷³¹ Cornell D & Muvangua N *Ubuntu and the Law: African Ideals and Postapartheid Jurisprudence* (2012) Introduction 8.

¹⁷³² Please see Section 4.2.3.5.

fact heard. This in turn, echoes the sentiments of Praeg regarding who is in fact permitted to join the conversation as previously described. Furthermore, this is in keeping with the state adopting a critical stakeholder engagement strategy so as to engage in constructive dialogue with the most vulnerable groups as a means of forging a just and caring society in which all people are treated with equal concern.

It should be noted that ubuntu, as an ethical concept, 'is always integral to a social bond' and seeks to 'encapsulate the moral relations demanded by human beings who must live together'.¹⁷³³ Thus, Cornell makes an astute observation in highlighting that:

'the aspirational aspect of ubuntu is that we must strive together to achieve a public good and a shared world so that we can harmonise our individual interests... It is ubuntu's embeddedness in our social reality that makes it a transformative ethic at its core'.¹⁷³⁴

However, the translation of any praxis (founded upon a precolonial logic of interdependence) into a philosophy will be characterised by an ever-present element of coercion.¹⁷³⁵ Praeg emphasises the extent to which the South African liberation struggle was premised on our inherent interdependence and fostering of shared ideals (i.e. solidarity was given expression in the rallying call of 'an injury to one is an injury to all').¹⁷³⁶ This line of thinking is developed by depicting gruesome necklace murders as the ultimate expression of the logic of coercion where certain members had betrayed the collective will of the people.¹⁷³⁷ Praeg consequently views solidarity as the sum total of the praxis of love,

¹⁷³³ Cornell D & Muvangua N *Ubuntu and the Law: African Ideals and Postapartheid Jurisprudence* (2012) Introduction 8.

¹⁷³⁴ Cornell D & Muvangua N *Ubuntu and the Law: African Ideals and Postapartheid Jurisprudence* (2012) Introduction 8.

¹⁷³⁵ Praeg L *Report on Ubuntu* (2014) 175.

¹⁷³⁶ Praeg L *Report on Ubuntu* (2014) 175.

¹⁷³⁷ Praeg L *Report on Ubuntu* (2014) 175.

sharing and work while coercion comes to the fore where 'differences of opinion' can be construed as a 'betrayal of belonging'.¹⁷³⁸

Ubuntu offers so much more than just being limited to an appeal to its indigenous roots as it also presents us with the 'philosophical project of solidarity' as well as an opportunity for radical transformation.¹⁷³⁹ Thus, public officials that have embraced ubuntu will seek to discharge their communal obligations and consequently strive to give effect to the realisation of urgent subsistent rights as a means to forge a just and caring society which will resonate with social solidarity ideals. Consequently, it is submitted that public officials that fail to discharge their obligations (as per the aspirational values/rights enshrined in the Constitution's Preamble and Bill of Rights respectively) could be viewed as exhibiting a 'betrayal of belonging'.

4.3.2 Ubuntu as a driver of social solidarity (also understood as nation-building) in South Africa

Ubuntu should be given serious consideration as it is a South African ideal which offers rich promise in promoting human solidarity.¹⁷⁴⁰ Furthermore, there is a need to embrace the pivotal role that ubuntu can play as both an ethical and legal value in South Africa.¹⁷⁴¹ Cornell argues for the legalisation of ubuntu (understood as an acceptance of the ethical and legal potency of ubuntu in a constitutional democracy) so as to galvanise belief in the importance of African philosophy/values in postcolonial societies as well as demonstrate the unique nature of African philosophy.¹⁷⁴²

Ubuntu is an African ideal which has the potential (and should in fact be utilised) to inform us universally about how to live together in a community founded upon ethical principles and shaped by a clear vision

¹⁷³⁸ Praeg L *Report on Ubuntu* (2014) 175.

¹⁷³⁹ Cornell D 'Ubuntu and Subaltern Legality' (2014) 170.

¹⁷⁴⁰ Cornell D 'Ubuntu and Subaltern Legality' (2014) 170.

¹⁷⁴¹ Cornell D 'Ubuntu and Subaltern Legality' (2014) 169.

¹⁷⁴² Cornell D 'Ubuntu and Subaltern Legality' (2014) 169.

of our interdependence.¹⁷⁴³ Thus, the starting point (as previously described) in mounting a credible defence of ubuntu is to note that it is indeed a pivotal ideal and value 'in the day-to-day life of South Africa, which is also precisely why it is so contested'.¹⁷⁴⁴ Thus, the communal obligations' focus of ubuntu (as advanced in this thesis) can fulfil a critical role in present-day South Africa as it can mesh with a human rights regime and serve as a catalyst in the forging of sustainable social solidarity ideals.

Cornell offers insights regarding the manner in which ubuntu can be deployed to wage war against racist Western modernity on philosophical, political and juridical grounds.¹⁷⁴⁵ There is a critical role to be played by ubuntu in resisting anti-black racism that is prevalent in existing politics and philosophy through 'whiteness' being ever-present in every mainstream philosophical notion/idea/ideal.¹⁷⁴⁶ Thus, ubuntu should be viewed as supporting a vision of a novel humanism that is at the forefront of a sustained philosophical, political and ethical attack on racism.¹⁷⁴⁷ Consequently, the racist assertion that ubuntu (by virtue of its meaning being contested and/or deemed vague) has no role to play in informing present day morality and legal jurisprudence should be dismissed out of hand.¹⁷⁴⁸

Coertze believes that ubuntu has become bound with 'human rights, dignity and nation-building as part of nationalist teleology'.¹⁷⁴⁹ In addition, Marx believes that the state is engaging in 'a convulsive attempt at nation-building' rather than 'developing and implementing reform programmes'.¹⁷⁵⁰ Furthermore, Bowler believes that ubuntu has been inserted 'within the rhetoric-laden discourse of nationalism,

¹⁷⁴³ Cornell D 'Ubuntu and Subaltern Legality' (2014) 169.

¹⁷⁴⁴ Cornell D 'Ubuntu and Subaltern Legality' (2014) 169.

¹⁷⁴⁵ Praeg L & Magadla S (eds) *Curating the Archive* (2014) Introduction 7.

¹⁷⁴⁶ Praeg L & Magadla S (eds) *Curating the Archive* (2014) Introduction 7.

¹⁷⁴⁷ Praeg L & Magadla S (eds) *Curating the Archive* (2014) Introduction 7.

¹⁷⁴⁸ Cornell D 'Ubuntu and Subaltern Legality' (2014) 170.

¹⁷⁴⁹ Coertze RD 'Ubuntu and Nation Building' *South African Journal of Ethnology* (2001) 113 -18.

¹⁷⁵⁰ Marx C 'Ubuntu: On the Dialectics of Apartheid and Nation Building' *Politikon* 29 (1): 49-69 (2002) 50.

unquestionably employed and imbued with the promise of a future that sounds much like utopia'.¹⁷⁵¹ It follows that there are significant obstacles that will need to be negotiated in order to successfully undertake a nation-building project.¹⁷⁵² The first obstacle is that belonging is thwarted by the absence of 'a collective construction of a democratic South Africa'.¹⁷⁵³ A critical (second) obstacle is that ubuntu as praxis was not about forging a community but required total immersion in that community by rendering the logic of interdependence visible in all engagements within that community.¹⁷⁵⁴ It is consequently challenging to devise a comprehensive nation-building project (as coloured by ubuntu philosophy) due to the fragile nature of *being* and *belonging* as experienced by South African citizens.¹⁷⁵⁵

Nonetheless, it is important to bear in mind the workings of the 'political economy of obligation' and the 'logic of interdependence', which are ever-present in the communal obligations that flow from ubuntu, in negotiating a path to a just and caring society.¹⁷⁵⁶ This once again demonstrates the need for the state to be held accountable in realising the urgent subsistence rights of vulnerable groups in South Africa as a means to have meaningful discussions about nation-building.

Coertze issues a warning in defining nation-building as the 'situation where a state authority through a process of directed cultural change, sometimes even forcibly, strives to promote a conscious sense of national identity'.¹⁷⁵⁷ Thus, a nation-building project informed by ubuntu would seek to impose a value system that would nurture allegiance to the nation, strive to secure equal citizenship and seek to promote conformity in the manner in which individuals conduct themselves.¹⁷⁵⁸

¹⁷⁵¹ Bowler DA 'Concluding reflections' (2014) 204.

¹⁷⁵² Bowler DA 'Concluding reflections' (2014) 205.

¹⁷⁵³ Bowler DA 'Concluding reflections' (2014) 205.

¹⁷⁵⁴ Bowler DA 'Concluding reflections' (2014) 205.

¹⁷⁵⁵ Bowler DA 'Concluding reflections' (2014) 205.

¹⁷⁵⁶ Please see the contribution by Praeg in Chapter 2.

¹⁷⁵⁷ Coertze RD 'Ubuntu and Nation Building' (2001) *South African Journal of Ethnology* 116.

¹⁷⁵⁸ Bowler DA 'Concluding reflections' (2014) 207.

Consequently, this is where danger could ostensibly be lurking as citizens would be expected to act in a manner dictated by ubuntu (or more specifically as prescribed by the architects of the nation-state project).¹⁷⁵⁹ This could play out as citizens being compelled to act in a certain manner 'without thinking too much'.¹⁷⁶⁰

The primary concern with the abovementioned strict conformist version of the nation-building project is that vigorous public debate regarding 'the material conditions for the possibility of really being and belonging together' is stifled and/or avoided.¹⁷⁶¹ Furthermore, a key concern regarding the nation-building project is noted as follows:

'In a nation so divided, fragmented and, in some instances, splintered, there is little commonality to be found, whether in being or in experience. To be effective as renewed praxis, ubuntu would have to be engineered to those interests that cannot be anything but common'.¹⁷⁶²

It is for the abovementioned reasons that there has been a persistent focus on communal obligations, as a core and uncontested part of ubuntu, so as to draw attention to the urgent subsistence needs of vulnerable groups that will have to be realised as part of forging a united and sustainable nation-state - that is, a just and caring nation-state in which all members are safeguarded against threats to their survival and have the possibility of exploring lives of purpose.

4.3.3 Case law pertinent to the overlap between ubuntu and social solidarity in South Africa

There is a pressing need for constructive dialogue (as well as ongoing information dissemination in our constitutional dispensation) in promoting understanding between landowners (i.e. the state and private landowners) and homeless people. The aforementioned understanding, if shaped and coloured by the communal obligations' focus of ubuntu,

¹⁷⁵⁹ Bowler DA 'Concluding reflections' (2014) 207.

¹⁷⁶⁰ Bowler DA 'Concluding reflections' (2014) 207.

¹⁷⁶¹ Bowler DA 'Concluding reflections' (2014) 207.

¹⁷⁶² Bowler DA 'Concluding reflections' (2014) 207.

will ensure that the urgent needs of vulnerable groups are prioritised by the state as a means to foster social solidarity in South Africa.

4.3.3.1 A brief analysis of the *Port Elizabeth Municipality* case in order to cast light on the obligations of the state in engaging with specific vulnerable groups

Himonga, Taylor and Pope believe that the judgment delivered in *Port Elizabeth Municipality v Various Occupiers* ('*PE Municipality*')¹⁷⁶³ should be heralded as 'a new dawn for ubuntu-based jurisprudence'.¹⁷⁶⁴ It is considered to be the most important case since *Makwanyane* as related to the utilisation of ubuntu.¹⁷⁶⁵

An application for eviction was lodged by the Port Elizabeth Municipality against various occupants that had illegally occupied private land.¹⁷⁶⁶ The aforementioned occupants had expressed their willingness to relocate if the Municipality was able to secure suitable, alternative living arrangements on their behalf.¹⁷⁶⁷ However, it should be noted that the Municipality remained adamant that there was no obligation on its part to secure alternative accommodation for the occupants.¹⁷⁶⁸ The Constitutional Court had to consider whether leave to appeal should be granted to the Municipality¹⁷⁶⁹, whether the eviction order (as set aside by the Supreme Court of Appeal) should be resurrected¹⁷⁷⁰ and/or whether the Municipality was compelled to secure alternative accommodation.¹⁷⁷¹ The Constitutional Court ultimately dismissed the application for leave to appeal.¹⁷⁷² Furthermore, the eviction order was refused as the Constitutional Court highlighted the need for an applicant in an eviction order application to demonstrate that reasonable efforts

¹⁷⁶³ *Port Elizabeth Municipality v Various Occupiers* 2004 (12) BCLR 1268 (CC) (hereafter *PE Municipality*).

¹⁷⁶⁴ Himonga, Taylor & Pope 'Reflections' (2013) *PELJ* 391.

¹⁷⁶⁵ Himonga, Taylor & Pope 'Reflections' (2013) *PELJ* 391.

¹⁷⁶⁶ *PE Municipality* (2004) para 1.

¹⁷⁶⁷ *PE Municipality* (2004) para 2.

¹⁷⁶⁸ *PE Municipality* (2004) para 51.

¹⁷⁶⁹ *PE Municipality* (2004) para 6.

¹⁷⁷⁰ *PE Municipality* (2004) para 6.

¹⁷⁷¹ *PE Municipality* (2004) para 6.

¹⁷⁷² *PE Municipality* (2004) para 60.

had been made to secure alternative accommodation.¹⁷⁷³ This in turn entailed demonstrating that consultation/mediation efforts had taken place with the occupants in question as a means to ensure that the pressing challenges of vulnerable groups had been articulated and considered.¹⁷⁷⁴

The Court was obliged to strike *a balance* between the rights of the property owners and the rights of the occupiers relating to access to housing and to protection from being unlawfully evicted from their dwellings.¹⁷⁷⁵ In this regard sections 25 and 26 of the Constitution (regarding property rights and housing rights respectively) and the Prevention of Illegal Eviction and Unlawful Occupation of Land Act¹⁷⁷⁶ ('PIE') served to provide the constitutional and statutory point of reference in undertaking the balancing act.¹⁷⁷⁷ Thus, Justice Sachs held that the aforementioned sections of the Constitution and PIE rendered it necessary to *balance the interests* of property owners and unlawful occupiers in a 'principled way' so as to promote 'the constitutional vision of a caring society based on good neighbourliness and shared concern'.¹⁷⁷⁸ The aforementioned quotation is viewed as resonating with the ethical and politico-ideological elements of ubuntu and in so doing compels the Constitutional Court to promote reconciliation by striving to improve the lived reality of all people in South Africa.¹⁷⁷⁹

The Constitutional Court further held that:

'...The spirit of ubuntu, part of the deep cultural heritage of the majority of the population, suffuses the whole constitutional order. It combines individual rights with a communitarian philosophy. It is a unifying motif of the Bill of Rights, which is nothing if not a structured,

¹⁷⁷³ *PE Municipality* (2004) para 58-59.

¹⁷⁷⁴ *PE Municipality* (2004) para 61.

¹⁷⁷⁵ *PE Municipality* (2004) para 13.

¹⁷⁷⁶ Prevention of Illegal Eviction and Unlawful Occupation of Land Act 19 of 1998.

¹⁷⁷⁷ Himonga, Taylor & Pope 'Reflections' (2013) *PELJ* 397.

¹⁷⁷⁸ *PE Municipality* (2004) para 37.

¹⁷⁷⁹ Cornell D & Muvangua N 'Ubuntu and the law: African ideals and post-apartheid jurisprudence' (2012) 16.

institutionalised and operational declaration in our evolving society of the need for human interdependence, respect and concern.¹⁷⁸⁰

The aforementioned description offers an enlightened view of ubuntu in that it recognises the interconnectedness and interdependence of people living side by side. Thus, Justice Sachs believes that the need to treat homeless people with dignity and respect is to be emphasised as eviction orders and forced removals violate not only the dignity of the homeless but also impact on the rest of society in eroding our moral worth.¹⁷⁸¹

Port Elizabeth Municipality marked the advent of the Court's approach in emphasising close ties between ubuntu and restorative justice even though the latter term did not appear in the judgment as such.¹⁷⁸² Furthermore, it spawned compelling ubuntu-based jurisprudence relating to eviction matters.¹⁷⁸³ In this regard Keep and Midgley note that the contribution of ubuntu (in eviction matters) is hardly a surprise in light of the fact that ubuntu is at its core concerned with communal relations and 'dignity through others'.¹⁷⁸⁴ Furthermore, Justice Sachs highlighted that it was necessary for bona fide engagement between the relevant parties to take place so as to secure 'mutually acceptable solutions' to legal disputes.¹⁷⁸⁵ In this regard he stated that it was no longer constitutionally permissible to view people as 'faceless and anonymous squatters' that should 'automatically...be expelled as obnoxious social nuisances'.¹⁷⁸⁶ Consequently, Justice Sachs stated that courts should proceed with caution and restraint when making a determination whether

¹⁷⁸⁰ *PE Municipality* (2004) para 37.

¹⁷⁸¹ *PE Municipality* (2004) para 18.

¹⁷⁸² Himonga, Taylor & Pope 'Reflections' (2013) *PELJ* 397.

¹⁷⁸³ Himonga, Taylor & Pope 'Reflections' (2013) *PELJ* 397. Please see *City of Johannesburg v Rand Properties (Pty) Ltd* (2007) 1 SA 78 (W) para 67. Please also see *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd* (2012) 2 SA 104 (CC) para 38.

¹⁷⁸⁴ Keep H & Midgley R 'The emerging role of ubuntu-botho' (2007) 43.

¹⁷⁸⁵ *PE Municipality* (2004) para 39.

¹⁷⁸⁶ *PE Municipality* (2004) para 41.

a specific eviction is just and equitable in the absence of proof that all reasonable steps had been taken to conclude a mediated solution.¹⁷⁸⁷

It is my firm view that having a housing programme deemed reasonable by a court (both in catering for a range of stakeholders/residents as well as its subsequent implementation) will not address the deprivation endured by vulnerable groups. It follows that the state will have to maintain an unerring focus on progressively realising the right of access to housing for vulnerable groups. Furthermore, it is my contention that one cannot speak about forging social solidarity/nation-building with any sort of (moral) authority when fellow members of the nation-state are staving off threats to their survival.

4.3.4 Conclusion

The critical role of dialogue (in which all members of society are included in the 'conversation') cannot be underestimated as a means to highlight the interconnectedness and interdependence of all people in society so as to forge a sustainable nation-state which draws heavily on social solidarity principles. Also, the aforementioned insight should serve to prick the social conscience (as well as shape the approach) of every public official that has embraced ubuntu. This will ensure that any engagement with vulnerable groups is viewed as engaging with partners of equal standing in which the latter group may well have a superior insight/perspective/approach/solution to an existing challenge in comparison to that same public official.

The abovementioned insights are critical in shaping the conduct of a public official heeding the call to embrace his/her membership of an ethical community (as well as subsequently safeguarding and strengthening that same membership) through prioritising the needs of vulnerable groups. In this regard the need for constructive dialogue between public officials (which includes ongoing information dissemination on the part of the state) and the very people that they are

¹⁷⁸⁷ *PE Municipality* (2004) para 61.

meant to serve cannot be emphasised enough in striving to create a just and caring society.

The abovementioned insights regarding membership of an ethical community is an apt description of the aspirational goal to be pursued in order to forge and sustain social solidarity ideals as explored in this chapter. In addition, Chapter 5 will explore various anthropology themes as a means to provide insight regarding the concept of 'lived reality' and the manner in which law is applied and/or revised and/or resisted on the ground. The aforementioned concept of 'lived reality' serves to draw attention to the plight of vulnerable groups. It is further submitted that the exploration of the aforementioned anthropological themes will serve to inform the nature and extent of the (communal) obligations owed to vulnerable groups by the relevant public officials as a means of promoting accountability as well as forging social solidarity. Thus, public officials that have discharged the aforementioned communal obligations would have in fact given effect to a nuanced understanding of ubuntu.

It is submitted that the various ethnographic case analyses of the social welfare state of Denmark (as described in this chapter) provide a critical point of reference in highlighting the manner in which South African public officials should seek to come to the aid of specific vulnerable groups – this can be achieved by developing a clear understanding of their lived reality whilst remaining mindful of the need to treat all members of society with equal concern and respect.

CHAPTER 5: ANTHROPOLOGY THEMES, COMMUNAL OBLIGATIONS AND THE 'LIVED REALITY' OF VULNERABLE GROUPS

5.1 Introduction

The previous chapter sought to explore the manner in which a sustainable version of social solidarity can be fashioned through an awareness of the manner in which differences amongst people can be accommodated. This chapter serves to demonstrate the manner in which anthropology can improve our understanding of the reception (as well as the reach) of law by offering illuminating insights into the lived reality of people living side by side. However, it should be noted at the outset that this chapter does not represent comprehensive anthropological research but rather seeks to highlight the manner in which an appreciation of anthropology themes can augment our understanding of the likely reception of law in any given environment.

The literal translation of 'anthropology' (as derived from ancient Greek) is the study of humanity.¹⁷⁸⁸ Anthropology offers a number of critical insights relating to the 'human condition' which remain relevant in a variety of settings.¹⁷⁸⁹ It can be persuasively argued that anthropology is necessary to develop an understanding of the contemporary world.¹⁷⁹⁰ Anthropology provides a 'perspective on humanity' in which all assumptions about human societies are probed and similarities as well as differences are laid bare.¹⁷⁹¹ It endorses an approach in which the human world is simultaneously surveyed from both 'a global and a local angle'.¹⁷⁹² Anthropology also seeks to develop an understanding of culture, society and humanity through studies of local life as well as by way of comparison.¹⁷⁹³

It is my view that anthropology, as a discipline, has a certain open-endedness which is far removed from the legal certainty that is routinely

¹⁷⁸⁸ Eriksen TH *What is Anthropology* (2006) 9.

¹⁷⁸⁹ Eriksen TH *What is Anthropology* (2006) 3.

¹⁷⁹⁰ Eriksen TH *What is Anthropology* (2006) 3

¹⁷⁹¹ Eriksen TH *What is Anthropology* (2006) 6

¹⁷⁹² Eriksen TH *What is Anthropology* (2006) 6

¹⁷⁹³ Eriksen TH *What is Anthropology* (2006) 7.

demanded by the legal profession. However, I am in agreement with the renowned anthropologist, Richard Jenkins, that one of the most important contributions that anthropology can offer, in strengthening our understanding of the human world, is to render the familiar and the everyday less familiar or to cast in a different light that which we believe to know with absolute certainty.¹⁷⁹⁴ It is important to note that one should not expect definitive answers from anthropologists as they do not routinely concern themselves with normative questions.¹⁷⁹⁵ Thus, the primary focus of an anthropologist is to clearly articulate what is happening on the ground.¹⁷⁹⁶ Furthermore, anthropology attaches great importance to concepts and values (as do other academic disciplines) but what sets it apart from other disciplines is its singlemindedness in understanding concepts as they find application in our everyday world.¹⁷⁹⁷ Consequently, the 'lived experience' is of crucial importance when undertaking an anthropological analysis in any specific environment.¹⁷⁹⁸

The concept of 'lived reality', as utilised in anthropology, is well suited to cast light on the manner in which vulnerable groups in South Africa have to endure intolerable hardship. This is epitomised by bearing witness to the seemingly never-ending deprivation of vulnerable people as outlined by Brand¹⁷⁹⁹ as well as the undignified existence of homeless people as outlined by Waldron.¹⁸⁰⁰ Thus, an understanding of 'lived reality' also speaks to the manner in which the lives of vulnerable people can be fundamentally changed through critical interventions by the state. This in turn dovetails neatly with the transformative nature of the South African Constitution in seeking to dismantle the legacy of apartheid through the progressive realisation of critical socio-economic rights.

¹⁷⁹⁴ Jenkins R *Being Danish* (2012) 142.

¹⁷⁹⁵ Grillo R 'Danes and others' (2011) 272.

¹⁷⁹⁶ Grillo R 'Danes and others' (2011) 272.

¹⁷⁹⁷ Grillo R 'Danes and others' (2011) 272.

¹⁷⁹⁸ Grillo R 'Danes and others' (2011) 272.

¹⁷⁹⁹ Please see Section 3.6.1.

¹⁸⁰⁰ Please see Section 3.6.3.

The critical role of dialogue is recognised in anthropology studies so as to develop an intimate understanding of the various stakeholders (and their respective needs) in society. Thus, the exploration of certain anthropological concepts in this Chapter will provide insight regarding the reach of law as well as an opportunity to assess suitable mechanisms to promote dialogue and information dissemination so as to educate vulnerable groups as to their subsistence rights. This will ensure that those same vulnerable groups are placed in a position to hold public officials accountable in the realisation of critical socio-economic rights.

It is my firm view that an exploration of relevant anthropological concepts will deepen our understanding of the (communal) obligations owed to vulnerable groups by public officials as provided for in the Bill of Rights in the Constitution. It is further submitted that it is tantamount to embracing a nuanced understanding of ubuntu (as advanced in this thesis) if the aforementioned public officials discharge those same obligations. This will in turn lead to the forging of a viable and sustainable nation-state in which all people are treated as having equal worth regardless of their perceived differences.

5.2 Anthropology strengthens our understanding of our lived reality and informs the manner in which law can make a more meaningful impact in society

My personal experience, in relation to my previous role as the nodal point for all anti-corruption criminal investigations (at a state-owned enterprise between 2010 and 2015), revealed that implicated employees as a rule had working knowledge of the relevant legislation yet those same employees failed to adequately discharge their work responsibilities. The aforementioned criminal investigations shed light on the perceived limitations of law in an environment where professional accountability was virtually absent as previously stated. Furthermore, the seemingly dominant mind-set was one of self-enrichment. Any 'official' duty performed by a public official for a member of the public was far too often

seen as a special favour (both by the public official as well as the relevant member of the public) rather than as a duty owed to the public.

My corruption investigations were focused primarily on tracking misappropriated corporate social investment funds that had been earmarked for erecting physical infrastructure in the educational sector in rural areas of the Eastern Cape.¹⁸⁰¹ It is submitted that the aforementioned crimes (as committed by corrupt public officials) served to exacerbate the palpable anger and despair within those communities on the back of (numerous) failed undertakings on the part of public officials to facilitate the progressive realisation of critical socio-economic rights.

My sojourn (as a visiting PhD Researcher) in the Department of Anthropology at the University of Copenhagen (between February 2015 and September 2015) provided me with an extraordinary and nuanced perspective of accountability, integration and social solidarity as experienced in Denmark. I was also exposed to the manner in which law is implemented, interpreted, revised and resisted on the ground as well as the perceived limitations of law. Furthermore, my understanding of supposedly simple and/or settled concepts in law was put to the test through an engagement with anthropology material. The abovementioned sojourn was identified as an essential component of my research as ubuntu is utilised in a political environment and it consequently demands a working knowledge of anthropology, political philosophy and law.

In this regard the anthropological concept of 'abandonment'¹⁸⁰² is identified as a means of understanding how perpetual neglect on the part of the state (in failing to advance the pressing socio-economic needs of

¹⁸⁰¹ Please see <https://www.timeslive.co.za/sunday-times/business/2017-10-03-petrosa-boss-in-court-over-r60m-fraud/>, (accessed 5 January 2017). Please also see <https://citizen.co.za/news/south-africa/94966/mom-embezzled-petrosa-sentenced/>, (accessed 5 January 2017).

¹⁸⁰² The concept was explored in discussions with one of my key mentors, Professor Henrik Vigh, during my sojourn at the Anthropology Department at the University of Copenhagen in 2015.

vulnerable groups) can lead to a crippling sense of hopelessness and despair amongst the aforementioned groups. This resonates with my criminal investigations experiences in the poverty-ridden Eastern Cape communities in which the prospect of 'living lives of value' was far removed from the harsh reality of negotiating survival on a near daily basis.¹⁸⁰³

Furthermore, there has also been ongoing engagement with a medical doctor¹⁸⁰⁴ as a means to develop insights regarding renal dialysis treatment in patients diagnosed with end stage renal failure (as dealt with in *Soobramoney*¹⁸⁰⁵) so as to draw attention to the lived reality of a specific vulnerable group. It is submitted that this thesis aims to prick the conscience of public officials (so as to strive to ease the burden of long-suffering vulnerable groups) through progressively giving effect to the socio-economic provisions in the Constitution.

5.3 A brief analysis of the Report on the Banality of Evil¹⁸⁰⁶ as a means to augment our understanding of what constitutes a diligent and ethical public official

The controversial book by Hannah Arendt provides extraordinary insights as to the duties that can legitimately be expected from diligent and ethical public officials as opposed to Nazi officials. It also casts light on the manner in which public officials should demonstrate an unerring commitment to give effect to the just laws of the land (e.g. the laws enshrined in the South African Constitution) as a means to forge an ethical and just society.

¹⁸⁰³ Please refer to Section 5.5 which briefly examines the perpetual deprivation endured by vulnerable groups in both South Africa and Uganda. Please see <https://www.timeslive.co.za/sunday-times/business/2017-10-03-petrosa-boss-in-court-over-r60m-fraud/>, (accessed 5 January 2017). Please also see <https://citizen.co.za/news/south-africa/94966/mom-embezzled-petrosa-sentenced/>, (accessed 5 January 2017).

¹⁸⁰⁴ Please see Section 3.6.2.3 as well as Annexure 1.

¹⁸⁰⁵ Please see Section 3.6.2.

¹⁸⁰⁶ Arendt H *Eichmann in Jerusalem: A Report on the Banality of Evil* (2006) (hereafter *Banality of Evil*).

The book is centred on a description of the trial proceedings of Adolf Eichmann who had played a pivotal role in giving effect to the Final Solution (i.e. the extermination of the Jewish people) as devised by the Nazis.¹⁸⁰⁷ Eichmann was in charge of logistics (as related to the transportation of Jews to concentration camps).¹⁸⁰⁸ He was captured by Mossad (Israeli Secret Service) in Buenos Aires, Argentina on 11 May 1960.¹⁸⁰⁹ Eichmann subsequently stood trial in the District Court in Jerusalem on 11 April 1961.¹⁸¹⁰

The book courted controversy from the outset for depicting Eichmann as an efficient but 'banal' bureaucratic criminal which was far removed from the common portrayal of Nazi officers as cruel and vindictive monsters.¹⁸¹¹ The term 'banality' only appears on the last page of the book but it is an implied theme that can be traced throughout the book.¹⁸¹² Eichmann was charged with committing crimes against the Jewish people, crimes against humanity and war crimes for the whole of the Nazi regime period in terms of the *Nazis and Nazi Collaborators Punishment Law of 1950*.¹⁸¹³

The judges deemed Eichmann to be a 'perpetual' liar as they found it difficult to accept that an 'average, "normal" person, neither feeble-minded nor indoctrinated nor cynical, could be perfectly incapable of telling right from wrong'.¹⁸¹⁴ The position assumed by the court had the unfortunate consequence of obscuring the most pressing moral (and legal) challenge in the court matter.¹⁸¹⁵ Arendt noted that Eichmann could certainly be considered 'normal' within the ranks of the Nazi regime but that it would in fact take an 'exception' in the Nazi regime to exhibit

¹⁸⁰⁷ Arendt H *Banality of Evil* (2006) 12.

¹⁸⁰⁸ Arendt H *Banality of Evil* (2006) 12.

¹⁸⁰⁹ Arendt H *Banality of Evil* (2006) 21.

¹⁸¹⁰ Arendt H *Banality of Evil* (2006) 21.

¹⁸¹¹ Arendt H *Banality of Evil* (2006) 12.

¹⁸¹² Arendt H *Banality of Evil* (2006) 12.

¹⁸¹³ Arendt H *Banality of Evil* (2006) 21.

¹⁸¹⁴ Arendt H *Banality of Evil* (2006) 26.

¹⁸¹⁵ Arendt H *Banality of Evil* (2006) 26.

what could properly be depicted as normal behaviour.¹⁸¹⁶ Nonetheless, the court held that Eichmann did in fact know what he was doing at all material times and that he was legally responsible for his actions.¹⁸¹⁷

It should be noted that the relentless attention to detail exhibited during the implementation of the Final Solution was attributed to a common belief (at the time) in Germany that to be a law-abiding citizen entailed not only observing the relevant laws but to conduct oneself in a manner as if one was 'the legislator of the laws that one obeys'.¹⁸¹⁸ This led to a deep-seated conviction that going beyond the call of duty was the expected standard.¹⁸¹⁹ The aforementioned (unwavering) commitment to duty would indeed be a commendable trait on the part of public officials if the laws of the land were in fact of a just nature - as is the case with the South African Constitution.

A poet and author, Abba Kovner, took the witness stand in the Eichmann trial and made mention of Sergeant Anton Schmidt of the German Army, who had assisted members of the Jewish underground (including the aforementioned witness) with forged papers and military trucks without any expectation of payment.¹⁸²⁰ He provided the aforementioned assistance for a period of five months between October 1941 and March 1942 at the end of which he was arrested and executed.¹⁸²¹ Arendt contemplated just how different things would have been if there were many more individuals/officials/soldiers that could have resisted the temptation to murder, steal and feign ignorance while their Jewish neighbours were carted off to their destruction and only ever offered to intervene for the sole purpose of turning a profit (i.e. exceptions to the rule such as Sergeant Schmidt).¹⁸²²

¹⁸¹⁶ Arendt H *Banality of Evil* (2006) 27. Please see Zulu P *A Nation in Crisis* (2013) 30 for a description of 'coherent value consensus'.

¹⁸¹⁷ Arendt H *Banality of Evil* (2006) 90.

¹⁸¹⁸ Arendt H *Banality of Evil* (2006) 137.

¹⁸¹⁹ Arendt H *Banality of Evil* (2006) 137.

¹⁸²⁰ Arendt H *Banality of Evil* (2006) 230. Please see Zulu P *A Nation in Crisis* (2013) 30.

¹⁸²¹ Arendt H *Banality of Evil* (2006) 230.

¹⁸²² Arendt H *Banality of Evil* (2006) 231.

The death penalty was imposed on Eichmann on 15 December 1961.¹⁸²³ The review proceedings commenced in the Court of Appeal (Israel's Supreme Court) on 22 March 1962.¹⁸²⁴ The aforementioned review proceedings were concluded within a week and on 29 May 1962 the Court of Appeal confirmed all the findings of the lower court.¹⁸²⁵ Arendt believed that the confused and feeble utterances by Eichmann in the gallows spoke to the 'fearsome, word-and-thought-defying *banality of evil*'.¹⁸²⁶ Eichmann is deemed to have displayed 'sheer thoughtlessness', which is far removed from stupidity, and which ultimately set him on a course to becoming 'one of the greatest criminals of that period'.¹⁸²⁷ Furthermore, if the aforementioned conduct of Eichmann could be viewed as banal (and more so in the absence of seemingly vile and demonic character traits) that in no way could or should be equated with what is viewed as 'commonplace'.¹⁸²⁸

Arendt believes that it is in the nature of a totalitarian government (and perhaps the workings of every bureaucracy) to transform people into cogs in a machine so as to dehumanise them.¹⁸²⁹ However, it should be clear that 'manifestly criminal orders' must not be complied with nor executed.¹⁸³⁰ Nonetheless, it is apparent that Eichmann was on the receiving end of 'superior orders' despite the contrary findings of the Court of Appeal.¹⁸³¹ Thus, Arendt believes that it would have been challenging to impose the death penalty if the logic of ordinary Israeli law had found application.¹⁸³² This is because the issuing of 'superior orders' (despite their unlawfulness being manifest) can 'severely disturb the normal working of a man's conscience'.¹⁸³³ It is my firm contention that

¹⁸²³ Arendt H *Banality of Evil* (2006) 231.

¹⁸²⁴ Arendt H *Banality of Evil* (2006) 231.

¹⁸²⁵ Arendt H *Banality of Evil* (2006) 231.

¹⁸²⁶ Arendt H *Banality of Evil* (2006) 231.

¹⁸²⁷ Arendt H *Banality of Evil* (2006) 287.

¹⁸²⁸ Arendt H *Banality of Evil* (2006) 287.

¹⁸²⁹ Arendt H *Banality of Evil* (2006) 289. Please see Makwanyane (1995) para 224 in which Justice Langa highlights the manner in which ubuntu could counter the 'dehumanisation' as outlined by Arendt.

¹⁸³⁰ Arendt H *Banality of Evil* (2006) 289.

¹⁸³¹ Arendt H *Banality of Evil* (2006) 289.

¹⁸³² Arendt H *Banality of Evil* (2006) 292.

¹⁸³³ Arendt H *Banality of Evil* (2006) 292.

public officials in South Africa that embrace ubuntu will indeed be able to counter the abovementioned desensitising effects of bureaucracy through giving effect to constant humanising acts in facilitating the progressive realisation of (constitutionally guaranteed) socio-economic rights.

An analysis of the banality of evil was included in this thesis so as to draw attention to the critical role to be played by every public official in giving effect to the (just) laws of the land for the benefit of the public. There is a very real need for each and every one of our public officials to be 'the exception to the rule' (in the mould of the heroic Sergeant Schmidt) so as to expedite the realisation of critical subsistence rights on behalf of vulnerable groups. There is a further need to guard against 'indifference' even 'thoughtlessness' (as described by Praeg and Arendt respectively) when executing your duties (as a public official) so as to prioritise the urgent needs of vulnerable groups. It follows that public officials that give effect to our Constitution (which is founded upon the principles of human dignity, equality and freedom¹⁸³⁴ [and is far removed from abhorrent Nazi laws]) will serve as the bedrock in forging a just, caring and united nation-state.

5.4 An analysis of the semi-autonomous social field as a means to bolster our understanding of how law is experienced on the ground

The insights offered by De Vos in the text to follow serve to bolster my assertion regarding the importance of the contribution by Sally Falk Moore in relation to the semi-autonomous social field.¹⁸³⁵ De Vos believes that it is of critical importance to highlight the shortcomings of legislation or state policies which aim to realise the transformative goals of the Constitution but neglect to consider the social and economic

¹⁸³⁴ In this regard please recall that Section 7(2) of the Constitution of the Republic of South Africa, 1996 provides that 'The state must respect, protect, promote and fulfil the rights in the Bill of Rights.'

¹⁸³⁵ Moore SF 'Law and social change: the semi-autonomous social field as an appropriate subject of study' 7 *Law & Society Review* 719 (1973) (hereafter The semi-autonomous social field.)

context within which the aforementioned legislation and state policies have to take effect.¹⁸³⁶ This is especially true in the event that those same laws and policies disregard the plight and specific circumstances of particularly disadvantaged and vulnerable groups.¹⁸³⁷

It follows that the pivotal importance of sociological analysis is brought to the fore in accurately predicting the consequences of legislative innovations.¹⁸³⁸ There are a vast number of laws that surround any given social field but there are in fact only a limited number of critical laws and/or rules that drive bargaining, competition and unique exchange processes in a specific social field.¹⁸³⁹ The prevalence of binding rights and obligations (that are not legally enforceable) serve to emphasise that legal rules are often a minor component in a specific social complex.¹⁸⁴⁰ The reality is that the likelihood of state action/intervention is often far removed as compared to other pressures and inducements within a specific social field.¹⁸⁴¹

It should be noted that the belief, that the application of law in a given society is universal, is a myth.¹⁸⁴² The reality is that most rules of law are described as being (theoretically) applicable to all people but those same laws affect only a limited number/a certain category of people in a limited number of circumstances.¹⁸⁴³ A general scrutiny of the law and social change highlight the need for the legislature to be aware that the components of a social field that are visible (or are deemed to be susceptible to legal innovation) are often the formal parts of the social system.¹⁸⁴⁴ However, the informal meshing of economic and educational advantages (as well as an enviable network of contacts) will be that

¹⁸³⁶ De Vos P 'Grootboom' *SAJHR* (2001) 266.

¹⁸³⁷ De Vos P 'Grootboom' *SAJHR* (2001) 267.

¹⁸³⁸ Moore SF 'The semi-autonomous social field' (1973) *Law & Society Review* 730.

¹⁸³⁹ Moore SF 'The semi-autonomous social field' (1973) *Law & Society Review* 730.

¹⁸⁴⁰ Moore SF 'The semi-autonomous social field' (1973) *Law & Society Review* 729.

Please see Praeg L *Report on Ubuntu* (2014) 65 in which communal obligations flow as a rule from ubuntu and benevolent coercion (in terms of which members are pressured to conform to community ideals) is ever-present.

¹⁸⁴¹ Moore SF 'The semi-autonomous social field' (1973) *Law & Society Review* 729.

¹⁸⁴² Moore SF 'The semi-autonomous social field' (1973) *Law & Society Review* 729.

¹⁸⁴³ Moore SF 'The semi-autonomous social field' (1973) *Law & Society Review* 734.

¹⁸⁴⁴ Moore SF 'The semi-autonomous social field' (1973) *Law & Society Review* 741.

much more difficult to dismantle through legislation and will in any event be that much more durable over time.¹⁸⁴⁵ Thus, legislation aimed at bringing about 'formal equality of opportunity' is deemed to not be equivalent to 'long held social position'.¹⁸⁴⁶ This is consistent with the observation by Cornell that the 'playing field' was not level to begin with (at the advent of democracy) if one considers the markedly uneven distribution of wealth and privilege in South Africa.¹⁸⁴⁷

It is critical to ascertain whether the law to be promulgated will in fact make a difference and/or produce the intended effect in relation to the intended target group.¹⁸⁴⁸ It is noted that the law (as related to state enforcement) is but one of many factors that influence the decisions and conduct of people as well as the relationships that they forge in society.¹⁸⁴⁹ Thus, it is only when law is analysed in the context of everyday social life that critical links between law and social change will surface.¹⁸⁵⁰ The belief exists that law can bring about social change and it is this very reason (or a variation thereof) that provides the rationale for the enactment of legislation.¹⁸⁵¹ Thus, it is necessary for both the law and the social context in which it operates to be subjected to scrutiny.¹⁸⁵² It is submitted that anthropology can provide illuminating insights as to the manner in which law and social conditions are inextricably linked. It is further submitted that it is indeed necessary to have a nuanced understanding of the lived reality of vulnerable groups so as to ascertain the manner in which the utilisation of law can bring about welcome and sustainable socio-economic advancement.

¹⁸⁴⁵ Moore SF 'The semi-autonomous social field' (1973) *Law & Society Review*.

¹⁸⁴⁶ Moore SF 'The semi-autonomous social field' (1973) *Law & Society Review*.

¹⁸⁴⁷ Cornell D 'A Call for a Nuanced Constitutional Jurisprudence' (2012) 328.

¹⁸⁴⁸ Moore SF 'The semi-autonomous social field' (1973) *Law & Society Review* 721.

¹⁸⁴⁹ Moore SF 'The semi-autonomous social field' (1973) *Law & Society Review* 743.

¹⁸⁵⁰ Moore SF 'The semi-autonomous social field' (1973) *Law & Society Review* 743.

Please see Section 5.6 for illuminating insights in relation to Intersectionality theory so as to develop a broad understanding of the key challenges negotiated by specific vulnerable groups.

¹⁸⁵¹ Moore SF 'The semi-autonomous social field' (1973) *Law & Society Review* 719.

¹⁸⁵² Moore SF 'The semi-autonomous social field' (1973) *Law & Society Review* 719.

The social field, as selected by an anthropologist, is analysed in relation to its semi-autonomy with the latter term defined as ‘the fact that it can generate rules and customs and symbols internally, but that it is also vulnerable to rules and decisions and other forces emanating from the larger world by which it is surrounded’.¹⁸⁵³ Furthermore, the semi-autonomous field also has the capability to insist upon compliance with its rules which could include the utilisation of coercive methods.¹⁸⁵⁴ It is fair comment that the formal legal institutions have the upper hand in deploying the legitimate use of force but the same cannot be said for other effective forms of inducement or coercion.¹⁸⁵⁵ It is accepted that the individual belongs to a number of smaller, organised social fields that are wedged between the body politic and that same individual.¹⁸⁵⁶ The aforementioned smaller social fields have their own distinctive customs and rules as well as specific mechanisms to induce compliance and/or coerce members.¹⁸⁵⁷

A scrutiny of semi-autonomous social fields provides persuasive proof that the various processes that render internally generated rules effective are often the immediate forces that prescribe the mode (and level) of compliance or non-compliance with state-made legal rules.¹⁸⁵⁸ Furthermore, a semi-autonomous field is defined by the absence of autonomy and isolation as well as being capable of generating rules and exacting conformity.¹⁸⁵⁹ The enactment of innovative legislation so as to introduce change inevitably invades the social fields within the boundaries of the state.¹⁸⁶⁰ However, innovative legislation often fails to fully (or even partially) succeed in their stated purposes and often result in unplanned and unexpected (and even unwanted) consequences.¹⁸⁶¹

¹⁸⁵³ Moore SF ‘The semi-autonomous social field’ (1973) *Law & Society Review* 720.

¹⁸⁵⁴ Moore SF ‘The semi-autonomous social field’ (1973) *Law & Society Review* 720.

¹⁸⁵⁵ Moore SF ‘The semi-autonomous social field’ (1973) *Law & Society Review* 721.

¹⁸⁵⁶ Moore SF ‘The semi-autonomous social field’ (1973) *Law & Society Review* 721.

¹⁸⁵⁷ Moore SF ‘The semi-autonomous social field’ (1973) *Law & Society Review* 721.

Please see Praeg L *Report on Ubuntu* (2014) at 24 and 65 in which members of a specific community are pressured to conform to communal rules.

¹⁸⁵⁸ Moore SF ‘The semi-autonomous social field’ (1973) *Law & Society Review* 721.

¹⁸⁵⁹ Moore SF ‘The semi-autonomous social field’ (1973) *Law & Society Review* 722.

¹⁸⁶⁰ Moore SF ‘The semi-autonomous social field’ (1973) *Law & Society Review* 723.

¹⁸⁶¹ Moore SF ‘The semi-autonomous social field’ (1973) *Law & Society Review* 723.

This is due in part to the new laws being foisted upon existing social arrangements in which an assortment of binding obligations are already in existence.¹⁸⁶²

Legislation is often promulgated to shape the existing social arrangements in a specific manner but it often happens that the existing social obligations trump the enacted legislation.¹⁸⁶³ It follows that a court or legislature 'can make custom law' while a semi-autonomous social field 'can make law its custom'.¹⁸⁶⁴ The latter happens when people in a social field are able to render a specific law operative by threatening its enforcement as a means to 'mobilise the coercive force of government'.¹⁸⁶⁵

An understanding of the semi-autonomous social field is pivotal in ascertaining the likely reception of law (as well as its potential effectiveness) on the ground in any given environment. It follows that diligent and committed public officials should seek to become intimately acquainted with the anthropological concept of 'lived reality' as a means to ascertain the critical needs of vulnerable groups in South Africa. This will ensure that the state is well placed to cater for those same vulnerable groups with targeted interventions (including legislation which specifically caters for the aforementioned vulnerable groups).

5.5 The lived reality of HIV positive people in Uganda and South Africa

This section offers penetrating insights regarding the lived reality of vulnerable groups and it is consequently of relevance in both a Ugandan and South African context. It also offers a measure of hope in light of the resilience of the people in exploring new ways of living as well as bearing testimony to the unwavering political will of the Ugandan state.

¹⁸⁶² Moore SF 'The semi-autonomous social field' (1973) *Law & Society Review* 723. Please see Praeg L *Report on Ubuntu* (2014) at 24, 65 and 175.

¹⁸⁶³ Moore SF 'The semi-autonomous social field' (1973) *Law & Society Review* 723

¹⁸⁶⁴ Moore SF 'The semi-autonomous social field' (1973) *Law & Society Review* 723.

¹⁸⁶⁵ Moore SF 'The semi-autonomous social field' (1973) *Law & Society Review* 744.

Susan Reynolds Whyte,¹⁸⁶⁶ the editor of *Second Chances - Surviving AIDS in Uganda* ('*Second Chances*'), has compiled a series of extraordinary accounts regarding the human tragedy visited upon the Ugandan people by AIDS.¹⁸⁶⁷ An exploration of the anthropological themes encountered in the book highlight the manner in which the Ugandan government demonstrated extraordinary leadership and political will. This is in stark contrast to the deplorable conduct of the South African government (as led by President Thabo Mbeki at the time) in failing to come to the assistance of HIV Positive people in a meaningful manner.

The observations of Natrass provide definitive insight as to the shameful conduct on the part of the state in dealing with the Aids crisis in South Africa.¹⁸⁶⁸ Natrass, an economist by training, sought to understand why the South African government had taken 'such a tragically wrong turn on AIDS' in the late 1990s by refusing to provide anti-retroviral therapy ('ART' or 'ARV') to HIV-positive mothers (so as to prevent infecting their babies) on the basis that it was not affordable.¹⁸⁶⁹ It should be noted at the outset that the South African government would have saved money by implementing Mother to Child Transmission Prevention as ARV prophylaxis was significantly more cost-effective than treating AIDS-sick babies.¹⁸⁷⁰

Furthermore, the lack of political will on the part of the South African government, in dealing with the AIDS pandemic, was justifiably criticised as compared to other developing countries which often had significantly more challenges to negotiate.¹⁸⁷¹ Uganda is in fact one of the countries identified by Natrass as performing better than expected in relation to

¹⁸⁶⁶ Professor Susan Reynolds Whyte was one of my key mentors during my sojourn at the University of Copenhagen in 2015.

¹⁸⁶⁷ Whyte SR 'The First Generation' in Whyte SR (ed) *Second Chances: Surviving AIDS in Uganda* (2014) (hereafter *The First Generation*).

¹⁸⁶⁸ Natrass N 'Mortal combat: aids denialism and the struggle for antiretrovirals in South Africa' (2007) (hereafter *Mortal Combat*).

¹⁸⁶⁹ Natrass N *Mortal Combat* (2007) 3.

¹⁸⁷⁰ Natrass N *Mortal Combat* (2007) 3.

¹⁸⁷¹ Natrass N *Mortal Combat* (2007) 6.

the difference between predicted and actual ARV coverage.¹⁸⁷² The aforementioned (actual) coverage in Uganda was credited to political support at the highest level.¹⁸⁷³ It strongly suggests that unwavering political will on the part of the state, so as to ease the plight of a vulnerable group (i.e. HIV positive patients), can make an extraordinary difference in progressively realising access to critical health care rights. Uganda is described as exemplary (in comparison to other African countries with South Africa being an obvious example) in light of its swift, comprehensive approach in seeking to combat AIDS.¹⁸⁷⁴ The enlightened stand on AIDS adopted by President Yoweri Museveni secured phenomenal donor support and Uganda was transformed into a country that played host to numerous global health interventions.¹⁸⁷⁵ This was in stark contrast with citizens of other eastern and southern African states that had extremely limited exposure to information campaigns and AIDS projects.¹⁸⁷⁶ It should be noted that people secured access to ART from a variety of sources in Uganda as opposed to most other countries where ART is almost always provided through government facilities.¹⁸⁷⁷ Thus, the ethnographic study which culminated in the publication of *Second Chances* had engaged with interlocutors from 7 different treatment sites in Uganda in order to more accurately reflect conditions on the ground in Uganda.¹⁸⁷⁸ However, it is critical to note that the Ugandan government was instrumental in raising awareness of the devastating effects of HIV/AIDS through a stream of information campaigns (as described below) which served as a catalyst for people to seek treatment as and when it became available. Furthermore, the approach of the Ugandan government (in swiftly acknowledging the extent of the crisis as well as welcoming partnerships

¹⁸⁷² Natrass N *Mortal Combat* (2007) 6.

¹⁸⁷³ Natrass N *Mortal Combat* (2007) 6.

¹⁸⁷⁴ Whyte SR 'The First Generation' (2014) 4.

¹⁸⁷⁵ Whyte SR 'The First Generation' (2014) 7.

¹⁸⁷⁶ Whyte SR 'The First Generation' (2014) 7.

¹⁸⁷⁷ Whyte SR 'The First Generation' (2014) 7.

¹⁸⁷⁸ Whyte SR 'The First Generation' (2014) 7.

with international donor agencies) attracted substantial funding for both treatment and training.

The first generation to receive ART in Uganda benefitted tremendously from comprehensive information campaigns and a myriad of AIDS projects which took place well before the advent of effective ART provisioning had occurred.¹⁸⁷⁹ The aforementioned approach by the Ugandan government highlights the importance of a state disseminating critical information as a means to prioritise the needs of vulnerable groups. It is submitted that the South African state should have adopted a similar approach as a means to facilitate the progressive realisation of urgent health care rights (in keeping with its constitutional obligations and ICESCR commitments).

The provision of ARVs between 2000 and 2010 in Uganda ensured that thousands of people in Uganda (who should have perished from AIDS) were offered a 'second chance' at life.¹⁸⁸⁰ They are deemed to be the first generation in that they have made positive gains on the back of increased ART availability and a proliferation of programmes which have provided both treatment and support.¹⁸⁸¹ Furthermore, this is a generation that is viewed as understanding AIDS as a fatal disease which had ended the lives of their loved ones after protracted and debilitating suffering.¹⁸⁸²

There are three distinct yet meshed themes which underpin the approach in understanding HIV positive Ugandans in their lived reality.¹⁸⁸³ The first theme being that of a *generation* which has had the benefit of ART provision and supplementary care.¹⁸⁸⁴ The second theme is *sociality* which seeks to ascertain the manner in which social relations have been shaped by the disease and how *sociality* has subsequently

¹⁸⁷⁹ Whyte SR 'The First Generation' (2014) 4.

¹⁸⁸⁰ Whyte SR 'The First Generation' (2014) 1.

¹⁸⁸¹ Whyte SR 'The First Generation' (2014) 1.

¹⁸⁸² Whyte SR 'The First Generation' (2014) 1. Please see Biney A '*The historical discourse on African humanism*' (2014) 48 which highlights the perpetual suffering of vulnerable groups/communities in Africa.

¹⁸⁸³ Whyte SR 'The First Generation' (2014) 2.

¹⁸⁸⁴ Whyte SR 'The First Generation' (2014) 2.

changed as a result.¹⁸⁸⁵ *Sociality* provides for the exploration of everyday interactions which happen outside of the gaze of ‘health-policy makers’ but which are deemed critical to forge a comprehensive understanding of healthcare.¹⁸⁸⁶ The third theme is that of *second chances* which seeks to ascertain how patients receiving life-saving ART utilised ‘the stay of execution’ and how it has affected their view of the present as well as the promise which the future holds.¹⁸⁸⁷ *Second chances* seeks to focus on matters that go beyond medical treatment and ‘biological survival’ by concentrating on ‘well-being’ or ‘improved being’ at the very least.¹⁸⁸⁸

Second chances is comprised of the elements of reprieve, conversion, contingency and reflection.¹⁸⁸⁹ A reprieve is a stay of execution (i.e. the routine consumption of ART keeps death at bay) and constitutes a critical building block of a ‘second chance’.¹⁸⁹⁰ However, a reprieve does not automatically translate into a different life.¹⁸⁹¹ Conversion suggests embarking on a new and better life pathway as brought about by being gifted a second chance through ART.¹⁸⁹² In Uganda there is strong resonance with conversion/salvation (as embraced by the Christian faith) which is characterised by being born again and seeking to pursue a life of devotion and purity.¹⁸⁹³ In this regard there is a clear focus on the rollout period of ART when it first became freely available and ordinary people bore witness to its effects.¹⁸⁹⁴

Contingency (or chanciness) is viewed as potentially the most important element of second chances despite the fact that it is often

¹⁸⁸⁵ Whyte SR ‘The First Generation’ (2014) 2.

¹⁸⁸⁶ Whyte SR ‘The First Generation’ (2014) 2.

¹⁸⁸⁷ Whyte SR ‘The First Generation’ (2014) 2.

¹⁸⁸⁸ Whyte SR ‘The First Generation’ (2014) 18. Please see Bilchitz D *Poverty and Fundamental Rights* (2007) 5 which serves as an insightful point of reference in highlighting the minimum core obligation approach in relation to subsistence rights.

¹⁸⁸⁹ Whyte SR ‘The First Generation’ (2014) 18.

¹⁸⁹⁰ Whyte SR ‘The First Generation’ (2014) 18.

¹⁸⁹¹ Whyte SR ‘The First Generation’ (2014) 18.

¹⁸⁹² Whyte SR ‘The First Generation’ (2014) 19.

¹⁸⁹³ Whyte SR ‘The First Generation’ (2014) 19.

¹⁸⁹⁴ Whyte SR ‘The First Generation’ (2014) 3.

overlooked.¹⁸⁹⁵ The lived reality for most Ugandans is that of an uncertain future due to crippling poverty, poor health infrastructure and the glaring absence of state welfare mechanisms.¹⁸⁹⁶ The preferred word in Ugandan English is 'gambling' to denote an uncertain future due to the absence of any sort of economic security.¹⁸⁹⁷ Meinert defines contingency/gambling as the transition 'from certain death to uncertain survival'.¹⁸⁹⁸ The interpersonal dependencies that characterise Ugandan sociality are a critical avenue in seeking to reduce chanciness.¹⁸⁹⁹ However, this is in itself premised on a less than ideal situation in that your situation at any given time is essentially tied to those that you are dependent on and any setback suffered by the latter is certain to have material consequences (in every sense of the word) on the wellbeing of all dependents.¹⁹⁰⁰ It is submitted that the aforementioned interpersonal dependency is in fact the lived reality of grant recipients in South Africa who have had to endure ongoing uncertainty as to whether SASSA would give effect to its obligations in a timeous fashion - the aforementioned uncertainty is compounded by the fact the social grant as a rule has to not only cater for the specific needs of the grant recipient but also has to meet the needs of a number of people dependent on the aforementioned grant recipient.

Reflection is brought about by a new lease on life (as granted by ART provision) in which people can contemplate anew aspects of their lives such as family life, sexual partnerships and children.¹⁹⁰¹ The critical distinction between 'a living and a life' is explored in which 'a living' suggests an adequate livelihood while 'a life' speaks to 'a social existence of reciprocity and respect'.¹⁹⁰²

¹⁸⁹⁵ Whyte SR 'The First Generation' (2014) 20.

¹⁸⁹⁶ Whyte SR 'The First Generation' (2014) 20. Please see Biney A 'The historical discourse on African humanism' (2014) 48.

¹⁸⁹⁷ Whyte SR 'The First Generation' (2014) 20.

¹⁸⁹⁸ Meinert *et al* 'Tests for Life Chances: CD4 Miracles and Obstacles in Uganda' *Anthropology and Medicine* 16, No 2. 195-209 (2009) 196.

¹⁸⁹⁹ Whyte SR 'The First Generation' (2014) 21.

¹⁹⁰⁰ Whyte SR 'The First Generation' (2014) 21.

¹⁹⁰¹ Whyte SR 'The First Generation' (2014) 21.

¹⁹⁰² Whyte SR 'The First Generation' (2014) 21.

Whyte rightfully believes that *generations*, *sociality* and *second chances* encourage a hands-on approach that coax one to analyse how history, social relations, consciousness and subjectivity are intertwined in a specific place at a specific time.¹⁹⁰³ It should be noted that the abovementioned themes represent ‘modes of asking, rather than absolute answers’ concerning a process which is constantly revealing more of itself with the passing of time.¹⁹⁰⁴

The present ethnographic study (i.e. Second Chances) highlights the definitive links between the text (a clear focus on the disease) and the context (other health challenges as well as the pitfalls of life in general).¹⁹⁰⁵ In this regard there are striking parallels between the lived reality of vulnerable groups living in Uganda and South Africa respectively and there is consequently a demonstrated need for the state to display an unwavering commitment in coming to the aid of those very same groups. It is submitted that the concept of ‘contingency’ has a special resonance (both in Uganda and South Africa) in relation to vulnerable people living in abject poverty. Thus, the aforementioned concept serves to coax public officials (that have embraced ubuntu) to facilitate the realisation of critical socio-economic rights so that South Africa, as a just and caring nation, can proudly proclaim that all people within its borders are treated with equal concern.

It should be noted that Heywood believes that the endorsement of denialist views by President Mbeki increasingly influenced (as well as determined) health policy.¹⁹⁰⁶ Heywood notes that those same views prevented the government from discharging its constitutional obligations regarding the progressive realisation of access to health services (with specific reference to women and children living with HIV).¹⁹⁰⁷ The affidavit of Doctor Andrew James Grant (Acting Medical Superintendent of Bethesda Hospital) was included as part of the Replying Affidavit

¹⁹⁰³ Whyte SR ‘The First Generation’ (2014) 21.

¹⁹⁰⁴ Whyte SR ‘The First Generation’ (2014) 21.

¹⁹⁰⁵ Whyte SR & Mogenson HO & Meinert L ‘Life’ in Whyte SR (ed) *Second Chances: Surviving Aids in Uganda* 282.

¹⁹⁰⁶ Heywood M ‘Preventing mother-to-child HIV transmission’ (2003) *SAJHR* 294.

¹⁹⁰⁷ Heywood M ‘Preventing mother-to-child HIV transmission’ (2003) *SAJHR* 294.

Annexure in the *TAC* case – a telling excerpt from the aforementioned affidavit reads as follows:

‘...Doctors at this hospital have bought Nevirapine with their own money and are already administering it to patients who are confirmed to have HIV and who give informed consent...It is an easy drug to administer and we have seen no side effects on this regime (except extreme gratefulness)’.¹⁹⁰⁸

It is my view that this seemingly simple observation regarding ‘extreme gratefulness’ should in fact take pride of place in a just and caring society which strives to alleviate the suffering of vulnerable groups. Furthermore, the constant humanising acts demanded by ubuntu (as per the insights offered by Praeg regarding the primacy of communal obligations) is reflected in the manner in which the abovementioned medical personnel came to the aid of an especially vulnerable group.

The Treatment Action Campaign was formed as an independent organisation in 1999 and its first campaign sought to compel the government to offer MTCTP cover.¹⁹⁰⁹ In this regard the *TAC* case demonstrates what is in the realm of possibility if civil society is united in striving for the realisation of urgent socio-economic rights. It follows that civil society has a critical role to play in undertaking constructive dialogue with public officials (as well as targeted lobbying if so required) as a means to hold public officials to account and facilitate the realisation of urgent socio-economic rights.

The Treatment Action Campaign played an instrumental role in the reduction of the cost of ARVs with the cost of annual treatment for South Africa’s first-line highly active antiretroviral therapy (‘HAART’) regimen being pegged at US\$ 10439 per person in 2000 as compared to US\$182 in May 2005.¹⁹¹⁰ The number of HAART patients in the public sector in

¹⁹⁰⁸ Heywood M ‘Preventing mother-to-child HIV transmission’ (2003) *SAJHR* 294.

¹⁹⁰⁹ Please see <https://tac.org.za/category/about/>, (accessed on 12 January 2018).

¹⁹¹⁰ Please see https://tac.org.za/campaign_areas/access-to-affordable-quality-medicines/, (accessed 12 January 2018).

South Africa increased from approximately 7000 in mid-2004 to more than 200 000 towards the end of 2006.¹⁹¹¹ Natrass highlighted how South Africans accounted for 25% of people receiving ARVs in sub-Saharan Africa in 2005 when a comparative analysis highlighted that South Africa should have secured a significantly higher percentage of people receiving ARVs in the aforementioned region.¹⁹¹² However, it is tragic to note that only 35% of the people (of the original planned number) were covered by HAART in South Africa by September 2006.¹⁹¹³

It is estimated (for the period 1999 to 2007) that the utilisation of ARVs assisted in the prevention of 250 000 people from becoming infected with HIV than would have been the case in their absence.¹⁹¹⁴ However, the aforementioned figure could have been significantly higher if 'political will at the national level' had resembled that which was on display in the Western Cape.¹⁹¹⁵ Thus, it is estimated that a further 171 000 HIV infections could have been prevented over the same period.¹⁹¹⁶ The basic intervention programme prevented 247 000 AIDS deaths for the period 1999-2007 and the MTCTP programme prevented a further 67 000 AIDS deaths over the aforementioned period.¹⁹¹⁷ Furthermore, the HAART roll out programme prevented an additional 257 000 AIDS deaths over the same period despite the regrettable delay in the onset of the programme.¹⁹¹⁸ However, an additional 343 000 AIDS deaths could have been prevented if MTCTP and HAART had been rolled out nationally at the same rate as in the Western Cape.¹⁹¹⁹ Consequently, it is the abovementioned infections (171 000) that could have been averted as well as the AIDS deaths (343 000) that could have been prevented

¹⁹¹¹ Please see https://tac.org.za/campaign_areas/access-to-affordable-quality-medicines/, (accessed 12 January 2018).

¹⁹¹² Natrass N *Mortal Combat* (2007) 133.

¹⁹¹³ Natrass N *Mortal Combat* (2007) 133.

¹⁹¹⁴ Natrass N *Mortal Combat* (2007) 138.

¹⁹¹⁵ Natrass N *Mortal Combat* (2007) 138.

¹⁹¹⁶ Natrass N *Mortal Combat* (2007) 138.

¹⁹¹⁷ Natrass N *Mortal Combat* (2007) 138.

¹⁹¹⁸ Natrass N *Mortal Combat* (2007) 138.

¹⁹¹⁹ Natrass N *Mortal Combat* (2007) 138.

that provide insight as to the true extent of the human tragedy.¹⁹²⁰ The aforementioned tragedy was caused by failed political leadership (i.e. a demonstrated failure of accountability and an absence of political will) as illustrated by the inexplicable endorsement of AIDS-denialism/pseudo-science by President Mbeki.¹⁹²¹

The Treatment Action Campaign played a critical role in information dissemination (as well as grassroots mobilisation) through ongoing engagement with vulnerable groups so as to facilitate a right of access to healthcare.¹⁹²² In this regard Sipho Mthathi was tasked with formalising and consolidating the treatment literacy initiatives which culminated in the establishment of the Treatment Literacy Project in 2002.¹⁹²³ The aforementioned literacy project provided for the production of 'fact sheets and posters about HIV disease, ARVs and CD4 count monitoring which are distributed at national, regional and local workshops run by treatment literacy practitioners'.¹⁹²⁴ The Treatment Action Campaign empowered patients to develop a better understanding of the disease as well as the associated monitoring tests so as to enable those same patients to effectively engage with medical staff regarding treatment regimens and possible side effects.¹⁹²⁵ Furthermore, the Treatment Action Campaign successfully utilised the language of medical science in their workshops in order to optimise the information offering to vulnerable groups.¹⁹²⁶

It is my firm view that anthropology can make a critical contribution to the reception of law on the ground as it facilitates a clear and coherent vision of the lived reality of people and what is in fact required to introduce

¹⁹²⁰ Natrass N *Mortal Combat* (2007) 138.

¹⁹²¹ Natrass N *Mortal Combat* (2007) 138.

¹⁹²² Please see https://tac.org.za/campaign_areas/building-local-activism/, (accessed 12 January 2018).

¹⁹²³ Please see <https://tac.org.za/campaigns/treatment-literacy/>, (accessed 12 January 2018).

¹⁹²⁴ Please see <https://tac.org.za/campaigns/treatment-literacy/>, (accessed 12 January 2018).

¹⁹²⁵ Please see <https://tac.org.za/campaigns/treatment-literacy/>, (accessed 12 January 2018).

¹⁹²⁶ Natrass N *Mortal Combat* (2007) 166. Please see <https://tac.org.za/campaigns/treatment-literacy/>, (accessed 12 January 2018).

meaningful and sustainable change. A case in point is the manner in which an in-depth understanding of the specific plight of black women in remote rural regions of South Africa could provide definitive insight as to specific services and/or interventions (e.g. health-care, nutrition and housing) which are in fact required. In this regard it is submitted that anthropology played a critical role in providing Ugandan authorities/international donor agencies with critical information as to the (altered) lived reality of Ugandans receiving treatment as well as where to direct future funding/treatment efforts to maximise the (positive) impact of treatment programmes. It is further submitted that anthropological accounts of extraordinary success stories in Uganda served as a catalyst to attract even more international donor funding as donor agencies had a justifiable expectation that funds so directed would go that much further (in an environment in which the Ugandan state was a willing partner).

The abhorrent response by the state to the Aids pandemic in South Africa is offered up as compelling proof of the state failing in its duty to meet the needs of its most vulnerable citizens and in the process confirming the seemingly abstract nature of African Humanism in a contemporary context.¹⁹²⁷ Consequently, it is submitted that the limited resources of the state serve to emphasise the need for unwavering political will (on the part of the state) in order to maximise the reach and impact of critical health interventions in South Africa in the shortest possible time.

5.6 An exploration of Intersectionality so as to develop a nuanced understanding of the challenges negotiated by specific vulnerable groups

It is submitted that an understanding of Intersectionality will enable public officials in South Africa to develop illuminating insights as to the specific circumstances and conditions endured by vulnerable groups and

¹⁹²⁷ Biney A 'The historical discourse on African humanism' (2014) 43.

facilitate targeted intervention programmes to come to the aid of those same vulnerable groups.

Intersectionality, as devised by Kimberle Crenshaw, is a hands-on analytical tool that has its roots in Black feminism and Critical Race Theory.¹⁹²⁸ The term was coined to highlight the ‘marginalisation of Black women within not only anti-discrimination law but also in feminist and anti-racist theory and politics’.¹⁹²⁹

Intersectionality theory is at its core concerned with agitating for beneficial social change.¹⁹³⁰ Crenshaw initiated a two-pronged intervention which sought to expose as well as break down those instances of marginalisation.¹⁹³¹ The aforementioned instances of marginalisation were to be found ‘within institutionalised discourses that legitimised existing power relations (e.g. law)’ whilst simultaneously shedding light on how discourses of resistance (e.g. feminism and anti-racism) could in fact function as sites ‘that produced and legitimised marginalisation’.¹⁹³² In this regard Crenshaw provided an example of the subtle manner in which law had traditionally defined ‘the contours of sex and race discrimination through prototypical representatives i.e. white women and African-American men, respectively’.¹⁹³³ Thus, the aforementioned anti-discrimination approach confined the scope and reach of institutional transformation, sought to reduce both ‘the understanding of and advocacy around racism and patriarchy, and

¹⁹²⁸ Carbado & Crenshaw & Mays et al ‘Intersectionality: mapping the movements of a theory’ (2013) 10 (2) *Du Bois Review: Social Science Research on Race* 303 (hereafter Intersectionality).

¹⁹²⁹ Carbado & Crenshaw & Mays et al ‘Intersectionality’ (2013) *Du Bois Review* 303.

¹⁹³⁰ Carbado & Crenshaw & Mays et al ‘Intersectionality’ (2013) *Du Bois Review* 312.

¹⁹³¹ Carbado & Crenshaw & Mays et al ‘Intersectionality’ (2013) *Du Bois Review* 312. Please see Moore SF ‘The semi-autonomous social field’ (1973) *Law & Society Review* 729 which casts light on the challenges endured by vulnerable groups in their specific environments. Please also see Brand D ‘What Are Socio-Economic Rights For?’ (2003) 35 which serves to highlight the deprivation of specific vulnerable groups.

¹⁹³² Carbado & Crenshaw & Mays et al ‘Intersectionality’ (2013) *Du Bois Review* 312.

¹⁹³³ Carbado & Crenshaw & Mays et al ‘Intersectionality’ (2013) *Du Bois Review* 304.

undermined possibilities of meaningful solidarity by placing resistance movements at odds with each other'.¹⁹³⁴

It should be noted that Intersectionality as a theory is never completed nor exhausted by previous analyses or movements as it always remains an analysis-in progress.¹⁹³⁵ Furthermore, the reach and scope of Intersectionality has been expanded so as to analyse a broad range of issues as well as legal and political systems both in the United States as well as further afield.¹⁹³⁶

The insights offered by Intersectionality are consistent with the views of De Vos in that the more vulnerable and economically disadvantaged a group is, the more likely it is for the courts to find that the state had a constitutional duty to focus on the pressing needs of that community.¹⁹³⁷ De Vos utilises a fitting example (of black women in rural areas of South Africa requiring access to health care services) to emphasise that legislation enacted by the state in the health care services arena, which failed to take into account the urgent needs of those rural women, would likely be deemed 'constitutionally suspect'.¹⁹³⁸ I am in complete agreement with the aforementioned views of De Vos in relation to relevant legislation being viewed as 'constitutionally suspect' if it failed to address the critical needs of destitute black women in rural areas. In this regard it is submitted that Intersectionality serves to identify each and every one of the harsh conditions/inequalities that are brought to bear upon specific vulnerable groups (e.g. black women in rural areas) and can ensure that critical concerns/hazards are properly identified. This will ensure that diligent and committed public officials have deep-seated knowledge of how best to assist a specific vulnerable group.

Furthermore, there is a need to distinguish between thinking '*intersectionally*' and contemplating intersecting categories as per the insight offered by Crenshaw as follows:

¹⁹³⁴ Carbado & Crenshaw & Mays et al 'Intersectionality' (2013) *Du Bois Review* 304.

¹⁹³⁵ Carbado & Crenshaw & Mays et al 'Intersectionality' (2013) *Du Bois Review* 304.

¹⁹³⁶ Carbado & Crenshaw & Mays et al 'Intersectionality' (2013) *Du Bois Review* 304.

¹⁹³⁷ De Vos P 'Grootboom' *SAJHR* (2001) 267.

¹⁹³⁸ De Vos P 'Grootboom' *SAJHR* (2001) 267.

‘Black women sometimes experience discrimination in ways similar to white women’s experiences; sometimes they share very similar experiences with Black men. Yet often they experience double discrimination - the combined effects of practices which discriminate on the basis of race, and on the basis of sex. And sometimes, they experience discrimination as Black women - not the sum of race and sex discrimination, but as Black women’.¹⁹³⁹

This clarification of the crucial yet simple term ‘as’ in discrimination law does not cease with Black women but requires a constant return to a detailed analysis of the specific group in question as immersed in a specific set of circumstances.¹⁹⁴⁰ Thus, it is submitted that Intersectionality theory is an extraordinary tool to better understand the harrowing, specific circumstances of vulnerable groups in South Africa (e.g. black women in poverty-stricken rural areas or homeless people that find themselves in perilous circumstances). It follows that the state, if it were to utilise Intersectionality theory, would be able to fashion tailor-made interventions so as to bring an end to specific forms of discrimination/deprivation as endured by the vulnerable group in question.

5.7 The manner in which a nuanced understanding of Panopticism can colour our understanding of the shaping of accountable public officials

The *Panopticon* (as devised by Bentham)¹⁹⁴¹ serves as a starting point for an extraordinary exploration by Foucault regarding punishment and discipline.¹⁹⁴² The Panopticon is ultimately concerned with exploring accountability in that the subject exercises the necessary discipline so

¹⁹³⁹ MacKinnon CA ‘Intersectionality as method’ *Journal of Women in Culture and Society* (2013) Vol 38 No 4 1019.

¹⁹⁴⁰ MacKinnon CA ‘Intersectionality as method’ (2013) *Journal of Women in Culture and Society* 1019.

¹⁹⁴¹ Please see <https://www.utilitarianism.com/panopticon.html>, (accessed 12 January 2018).

¹⁹⁴² Foucault M *Discipline and Punish: The Birth of the Prison* 2 ed (1977) 200 (hereafter *Discipline and Punish*).

as to give effect only to the right choices.¹⁹⁴³ Foucault describes the Panopticon in the following manner:

‘at the periphery, an annular building; at the centre, a tower; this tower is pierced with wide windows that open onto the inner side of the ring; the peripheral building is divided into cells, each of which extends the whole width of the building; they have two windows, one on the inside, corresponding to the windows of the tower; the other, on the outside, allows the light to cross the cell from one end to the other. All that is needed, then, is to place a supervisor in a central tower and to shut up in each cell a madman, a patient, a condemned man, a worker or a schoolboy. By the effect of backlighting, one can observe from the tower, standing out precisely against the light, the small captive shadows in the cells of the periphery. They are like so many cages, so many small theatres, in which each actor is alone, perfectly individualised and constantly visible. The panoptic mechanism arranges spatial duties that make it possible to see constantly and to recognise immediately. In short, it reverses the principle of the dungeon; or rather of its three functions - to enclose, to deprive of light and to hide - it preserves only the first and eliminates the other two. Full lighting and the eye of the supervisor capture better than darkness, which ultimately protected. Visibility is a trap’.¹⁹⁴⁴

It should be noted that the individual is confined to a cell and is visible to the supervisor from the front but he has no contact with his fellow prisoners due to the presence of side walls on either side of each cell.¹⁹⁴⁵ The individual (prisoner) is rendered visible by the positioning of his cell

¹⁹⁴³ Foucault M *Discipline and Punish* (1977) 200.

¹⁹⁴⁴ Foucault M *Discipline and Punish* (1977) 200.

¹⁹⁴⁵ Foucault M *Discipline and Punish* (1977) 200.

in relation to the central tower yet he has to endure lateral invisibility.¹⁹⁴⁶
The aforementioned invisibility is deemed to guarantee order.¹⁹⁴⁷

It should be noted that Bentham believed that power should be visible and unverifiable.¹⁹⁴⁸ In this regard the prisoner is constantly confronted with the imposing outline of the central tower from which he/she is observed yet it cannot be confirmed whether he/she is being observed at any given moment.¹⁹⁴⁹ Nonetheless, the prisoner knows that he/she may be observed at any given moment.¹⁹⁵⁰ The Panopticon is viewed as a machine that brings about the 'homogenous effects of power' regardless of the task that it has been deployed to give effect to in a specific instance.¹⁹⁵¹

The imagery is fascinating if one imagines inserting a public official in one of the cells in the Panopticon so as to demonstrate the rendering of true discipline under the guise of general yet unverifiable surveillance. However, the fact that the public official can be seen but cannot see implies that he is 'the object of information' but never a subject in communication.¹⁹⁵² This marks a point of departure in this thesis with the seductive Panopticon imagery as ongoing dialogue between the public official and the public is necessary in order to shape a (contemporary) constitutional democracy in which all of us can find a home and enjoy a dignified existence. However, public officials that diligently discharge their constitutional obligations, as if they are under constant but unverifiable surveillance, serves as the key appeal of the Panopticon. Nonetheless, the composition/structure of the Panopticon has so much to offer in visualising/conceptualising a society in which

¹⁹⁴⁶ Foucault M *Discipline and Punish* (1977) 200.

¹⁹⁴⁷ Foucault M *Discipline and Punish* (1977) 200.

¹⁹⁴⁸ Please see <https://www.utilitarianism.com/panopticon.html>, (accessed 12 January 2018).

¹⁹⁴⁹ Foucault M *Discipline and Punish* (1977) 201.

¹⁹⁵⁰ Foucault M *Discipline and Punish* (1977) 201.

¹⁹⁵¹ Foucault M *Discipline and Punish* (1977) 202. Please see <https://www.utilitarianism.com/panopticon.html>, (accessed 12 January 2018).

¹⁹⁵² Foucault M *Discipline and Punish* (1977) 202.

public officials discharge their duties diligently as if they are under the (possibly ever-present) watchful eye of society at large.

Foucault believes that those that are subjected to a field of visibility (and have an awareness that they are being so observed) as a rule assume responsibility for the constraints of power and modify their behaviour accordingly.¹⁹⁵³ The aforementioned behaviour modification is effected so as to ensure that their conduct faithfully conforms to the contours of the established power constraints.¹⁹⁵⁴ This is accomplished without the need for the external observer/power to make its presence felt through physical confrontation.¹⁹⁵⁵

It should be noted that an observer (in the central tower/observation tower in the Panopticon) can follow a number of individuals with nothing more than a casual glance but he/she can in turn be viewed by any member of the public that enters the observation tower.¹⁹⁵⁶ Thus, it follows that public officials can be held accountable for their conduct in the following manner:

‘the seeing machine was once a sort of dark room into which individuals spied; it has become a transparent building in which the exercise of power may be supervised by society as a whole’.¹⁹⁵⁷

Furthermore, the Panopticon is viewed as a discipline mechanism that seeks to improve the exercise of power by fashioning ‘a design of subtle coercion for a society to come’ in which the exceptional discipline practised of old gave way to generalised surveillance.¹⁹⁵⁸

It is submitted that ubuntu as a political choice implies an acceptance of that same coercion in striving to give effect to communal obligations as a reflection of our interconnectedness and interdependence as a people

¹⁹⁵³ Foucault M *Discipline and Punish* (1977) 202.

¹⁹⁵⁴ Foucault M *Discipline and Punish* (1977) 202.

¹⁹⁵⁵ Foucault M *Discipline and Punish* (1977) 203.

¹⁹⁵⁶ Foucault M *Discipline and Punish* (1977) 207. Please see <https://www.utilitarianism.com/panopticon.html>, (accessed 12 January 2018).

¹⁹⁵⁷ Foucault M *Discipline and Punish* (1977) 207.

¹⁹⁵⁸ Foucault M *Discipline and Punish* (1977) 209.

living side by side in a nation-state. There are striking parallels between the coercive edge of ubuntu and the surveillance of the individual in his/her cell in the Panopticon in that both seek to discipline the conduct of the individual (styled in this thesis as a diligent public official) for the greater good of society.

The Panopticon offers compelling insights regarding the possibility that a public official could be effectively placed under general (yet unverifiable) surveillance (whether it be by his/her supervisor, the public at large or the Constitutional Court). It is submitted that behaviour so modified is indeed likely to promote the accountability of public officials in South Africa by progressively giving effect to critical subsistence rights as enshrined in the Constitution. It follows that the Constitutional Court could enter the observation tower of the Panopticon and bear witness to the manner in which one and every public official (i.e. the state) gives effect to the aforementioned subsistence rights. This serves to demonstrate the critical role to be assumed by the Constitutional Court, in providing overarching surveillance of the state in progressively realising constitutionally guaranteed rights, as a means to fulfil its mandate as the guardian of the Constitution.¹⁹⁵⁹

The reality is that a public official should always conduct himself/herself in a manner which is beyond reproach. However, in the absence of the Panopticon one could rely on ubuntu (if so embraced by diligent public officials) to faithfully reproduce the effects of the Panopticon. In this regard the conduct and decision-making of a public official is shaped at every turn by the overarching communal obligations owed to society in seeking to create (as well as sustain) a just and caring nation-state.

5.8 Summary

This chapter served to highlight how anthropology themes can provide extraordinary insight as to the lived reality of vulnerable groups in South Africa. Furthermore, this chapter sought to demonstrate that an

¹⁹⁵⁹ Please see sections 167(4), 167 (5), 169(a) and 172 of the Constitution of the Republic of South Africa, 1996.

accountable public official would defy unjust laws/practices so as to come to the aid of vulnerable groups. This chapter also served to highlight the inner workings of semi-autonomous fields which dictated that public officials should exercise caution in promulgating legislation in the absence of drawing on anthropological data – the aforementioned data is required to develop a clear understanding of the conditions on the ground so as to maximise the impact and reach of legislation. This will ensure that the most pressing needs of vulnerable groups are identified, suitably prioritised and subsequently realised. It is submitted that this is consistent with the communal obligations' focus of ubuntu which can serve to inform and colour the duties of public officials to ease the plight of vulnerable groups in South Africa.

In addition, this chapter sought to emphasise the debilitating effects of the HIV/AIDS pandemic in both South Africa and Uganda through an anthropological lens and served to highlight how political will on the part of the state can significantly alter the lived reality of vulnerable groups. Furthermore, this chapter cast light on Intersectionality theory as a means to develop a clear understanding of the lived reality of vulnerable groups so as to ensure that the state was better placed to assist those same vulnerable groups with targeted intervention programmes. This chapter also served to highlight the manner in which generalised surveillance of public officials could assist in ensuring that public officials give effect to their constitutional obligations without fail. In this regard the critical role of the Constitutional Court, in providing oversight of the conduct of the state in progressively realising socio-economic rights, is emphasised. In closing, it is submitted that the chapter to follow will provide concluding remarks as well as a list of recommendations.

CHAPTER 6: CONCLUSION AND RECOMMENDATIONS

6.1 Introduction

This thesis has sought to demonstrate the definitive link between the accountability of public officials in giving effect to socio-economic rights (as enshrined in the Constitution) and ubuntu (understood as embracing the primacy of communal obligations). Furthermore, it cast light on how the realisation of the aforementioned socio-economic rights will serve to forge social solidarity through striving to treat all people as having equal worth.

There are indeed certain aspects of ubuntu which are contested and/or not fully defined but the communal obligations' focus of ubuntu (as advanced in this thesis) is widely accepted and acknowledged as one of its core features. Thus, the starting point in mounting a credible defence of ubuntu is to note that it is indeed a pivotal ideal and value in South Africa.

It is submitted that the state is duty-bound to give effect to the aspirational values as well as socio-economic rights enshrined in the Constitution. Thus, public officials that embrace ubuntu, which is denoted by an unwavering focus on communal obligations, will diligently perform their duties (as provided for in the Constitution) as a means to create a just and caring society.

The minimum core obligation approach, as adopted by the ICESCR and subsequently modified by Bilchitz, is endorsed in this thesis for taking a firm stand in acknowledging that it is unacceptable for any human being to have to live without the means to maintain his/her survival. It follows that the state must do everything possible to remedy the aforementioned situation and that we should be 'intolerant' of anyone having to endure such deplorable living conditions. It is submitted that the aforementioned insights by Bilchitz are consistent with the communal obligations' focus of ubuntu in striving to forge a just and caring nation-state in which everyone is treated with equal respect and concern.

6.2 Anthropology

Anthropology can make a telling contribution in developing a refined understanding of the application of law through augmenting our understanding of the lived reality of vulnerable groups that have to endure seemingly perpetual deprivation.

The anthropological concepts of inclusion and exclusion are of critical importance in understanding the harsh living conditions that are endured by vulnerable groups in South Africa.¹⁹⁶⁰ The aforementioned anthropological concepts reflect the sentiments of Praeg who had drawn attention to the existence of power relations that dictated which people were permitted to be 'part of the conversation'.¹⁹⁶¹ Furthermore, an anthropological analysis compels one to view 'social communities and cultural ideas of belonging as constructions that are constantly challenged, contested and attributed with new meanings'.¹⁹⁶² The aforementioned analysis is of considerable interest as it sheds light on the manner in which the meaning of social solidarity, which is viewed as an integral part of the Danish political landscape, will be persistently contested and redefined over time.¹⁹⁶³ This is consistent with the views of Praeg in relation to the nature of ubuntu which too will be contested and redefined in the time to come.

It should be noted that anthropology provides insight regarding the ways in which members of a specific society must fashion an agreement (in relation to the manner by which they will live side by side) as a means of creating a viable society.¹⁹⁶⁴ This agreement does not insist upon cultural conformity but seeks to fashion a common understanding of the nature and extent of the cultural differences which can be accommodated in that society.¹⁹⁶⁵ This is in keeping with a key focus in this thesis in crafting a sustainable version of social solidarity in South

¹⁹⁶⁰ Please refer to Section 4.2.3.5.

¹⁹⁶¹ Praeg L *Report on Ubuntu* (2014) 15.

¹⁹⁶² Olwig KF & Paerregaard K "Strangers" in the nation' (2011)12.

¹⁹⁶³ Olwig KF & Paerregaard K "Strangers" in the nation' (2011)12.

¹⁹⁶⁴ Olwig KF & Paerregaard K "Strangers" in the nation' (2011) 11.

¹⁹⁶⁵ Olwig KF & Paerregaard K "Strangers" in the nation' (2011) 11.

Africa through the progressive realisation of critical subsistence rights of vulnerable groups. It is submitted that the aforementioned realisation of socio-economic rights will place all people in a position to live lives of purpose which will ably demonstrate that the state has due regard for the equal worth of each and every person.

It should be noted that diligent public officials will do everything possible to progressively realise the subsistence rights of the most vulnerable groups in the nation-state. This will inevitably lead those same public officials to seek out the best possible mechanisms to give effect to the aforementioned critical rights in the shortest possible time. Consequently, it is contended that embracing the real world application of anthropology will ensure that those same public officials develop an intimate understanding of the lived reality of vulnerable groups. This will ensure that public officials are in a position to alleviate the suffering of vulnerable groups – this in turn can be achieved through decisive interventions (including promulgating legislation and/or devising the optimal manner in which scarce resources are to be allocated) to meet the needs of specific vulnerable groups.

6.3 Jurisprudence of the Constitutional Court

The pivotal role of the Constitutional Court has been analysed so as to demonstrate the pressing need on its part to provide critical determinate content in relation to socio-economic rights. It is submitted that the aforementioned determinate content is of pivotal importance in facilitating the effective monitoring and enforcement of socio-economic rights.

It is submitted that the *Soobramoney*, *Grootboom* and *TAC* judgments of the Constitutional Court has not provided the state with the necessary guidance in formulating a suitable accountability standard in respect of the progressive realisation of socio-economic rights. In this regard the Court has failed to provide the state with critical determinate content for urgent subsistence rights (despite the incremental improvements on offer in the judgments moving in chronological order from *Soobramoney*

through *Grootboom* to *TAC*). It is my firm view that the reasonableness approach of the Constitutional Court is indeed flawed as one cannot ascertain whether the state has discharged its duties (in giving effect to critical subsistence rights) if the standard against which the conduct of the state is to be measured does not offer the necessary clarity as to the core content of those same socio-economic rights. In this regard the Constitutional Court has confined itself to assess the manner in which the policies of the state have been 'conceived and applied' rather than seeking to ascertain what those same policies are likely to achieve in the quest for the progressive realisation of rights.¹⁹⁶⁶ Thus, Brand is rightfully critical of the manner in which the Constitutional Court has portrayed itself as apolitical in the adjudication of socio-economic rights and highlighted that the Constitutional Court had expressly stated its role as 'an impartial regulator rather an active participant' in *Soobramoney*, *Grootboom* and *TAC*.¹⁹⁶⁷

The Constitutional Court should approach its judicial review function with a firm resolve in a present-day context so as to ensure that the state is called upon to account for the progressive realisation of socio-economic rights as a matter of urgency. The state should be compelled to account with specific reference to the broadest possible definition of 'available state resources' so as to demonstrate its accountability (as well as unwavering political will) in giving effect to critical subsistence rights. In this regard it is of pivotal importance to emphasise that the scarcity of resources does not dilute the rights a person has but rather affects the capacity of an individual to realise those rights.¹⁹⁶⁸ It is hoped that the moral tragedy in *Soobramoney* will serve as a catalyst/an ever-present reminder for the Constitutional Court to strive to ensure that all vulnerable groups are treated with the necessary concern. Nonetheless, the UN Committee acknowledges that there are circumstances in which

¹⁹⁶⁶ *Soobramoney* (1998) para 29. Please see *Grootboom* (2000) para 41 as well as *TAC* (2002) para 36.

¹⁹⁶⁷ Brand D 'What are socio-economic rights for?' (2003) 49.

¹⁹⁶⁸ Bilchitz D 'Towards a reasonable approach to the minimum core' (2003) *SAJHR* 15.

a specific state will be able to prove that it is not capable of giving effect to the minimum core obligation.¹⁹⁶⁹ However, the Constitutional Court must demand compelling proof on the part of the state in the event that the latter claims that it is unable to provide the minimum core obligation as related to key subsistence rights.¹⁹⁷⁰

It is fair comment that the Constitutional Court should display appropriate deference to the Executive and the Legislature as required by the separation of powers doctrine. However, this should not in any way undermine the ability of the Constitutional Court, as the primary guardian of the Constitution, to ensure that the state progressively realises the enshrined socio-economic rights in the Constitution as a matter of urgency. Thus, it is of paramount importance to draw specific attention to the manner in which the Constitutional Court has modified its approach (in response to the continued failure of the state to meet its constitutional obligations) by focussing on the primary thrust of section 195 in the *AllPay* and *Black Sash* cases. This is a step in the right direction in light of the documented shortcomings of the Constitutional Court to hold the state to the required standard (of accountability) in the *Soobramoney*, *Grootboom* and *TAC* cases. Furthermore, it is indeed encouraging that the Constitutional Court has explored the possibility of enforcing adverse cost orders against grossly negligent and/or obstructive public officials in their personal capacity as per the *AllPay* and *Black Sash* cases.

The Constitutional Court should embrace the minimum core obligation approach as endorsed by the ICESCR (and as subsequently advanced by Bilchitz) as it is a crucial mechanism in pegging the accountability of the state at an appropriate level so as to bring an end to the deprivation endured by vulnerable groups. Furthermore, it is prudent for the Constitutional Court to utilise the minimum core obligation approach in light of the ratification of the ICESCR by the Republic of South Africa.

¹⁹⁶⁹ General Comment No. 3: <http://www.refworld.org/docid/4538838b2.html>, (accessed 1 August 2016).

¹⁹⁷⁰ Bilchitz D 'Towards a reasonable approach to the minimum core' (2003) *SAJHR* 18.

This will facilitate the shaping of critical determinate content (consistent with our international law obligations as per the General Comments prepared by the UN Committee) for socio-economic rights and ensure that benchmarked sectoral targets are devised, subsequently disseminated by the state to the public and ultimately achieved so as to alleviate the suffering of vulnerable groups. Furthermore, it is of paramount importance for the Constitutional Court (as the guardian of the Constitution) to embrace an oversight role in ensuring that the state progressively realises constitutionally guaranteed socio-economic rights in as short a time as possible.

6.4 Ubuntu as a driver of accountability and social solidarity

It is important to bear in mind that ‘what is unique about Ubuntu is not any epistemological, ontological or even axiological specificity, but simply the fact of its being an actualised communitarian praxis of the humanising’.¹⁹⁷¹ The aforementioned insight furnished by Praeg serves to emphasise the communal obligations’ focus of ubuntu as well as its extraordinary utility in contemporary South Africa.

It is necessary to explore the political environment within which ubuntu has been deployed so as to draw attention to the manner in which the definition as well as the nature of ubuntu is contested and revised on a continuous basis. It is critical to have intimate knowledge of the political landscape within which ubuntu is deployed so as to counter distortions (e.g. the limited contribution that ubuntu could make in a constitutional democracy) that are likely to creep into contemporary public discourse. It follows that public officials should have the necessary insight with regards to the manner in which concepts are defined and contested in a political environment – this will ensure that ubuntu is utilised in a manner which will in fact promote the progressive realisation of critical subsistence rights. In this regard the distinction drawn by Praeg between ‘ubuntu’ as a living practice and ‘Ubuntu’ as an abstract philosophy is illuminating in exploring the political landscape.¹⁹⁷²

¹⁹⁷¹ Praeg L Report on Ubuntu (2014) 20.

¹⁹⁷² Please refer to Section 2.4.

However, it is submitted that the core component of ubuntu as defined in this thesis (i.e. the primacy of communal obligations) should remain at the forefront of future revisions of ubuntu as it is the embodiment of ubuntu as a living praxis.

The underlying objective of this thesis has been to explore and confirm the manner in which ubuntu, understood as an unwavering focus on communal obligations, can promote the accountability of public officials in order to fashion a just and caring nation-state in which social solidarity ideals will flourish. Thus, it is submitted that ubuntu can serve to shape the conduct of public officials and state institutions (in fostering a deep-seated awareness of the primacy of communal obligations) and in so doing prioritise the needs of vulnerable groups. Furthermore, embracing the values and spirit of ubuntu (on the part of public officials) will promote accountability by impacting on the manner in which each and every decision is taken so as to reflect a sincere concern for the wellbeing of all members of the nation-state. Thus, ubuntu is well suited to promote accountability by shaping a vision of shared obligations in order to pursue the progressive realisation of socio-economic rights as enshrined in the Constitution.

In addition, it is submitted that communal obligations is at the heart of ubuntu and it is subsequently well placed to make a significant contribution in our constitutional democracy in light of its ability to mesh with a human rights regime. Thus, the state is duty-bound to give effect to socio-economic rights which is in effect in keeping with the communal obligations' focus of ubuntu (in recognising the interdependence and interconnectedness of members living side by side in a just and caring nation-state). In this regard the state should provide benchmarked sectoral targets (in relation to the progressive realisation of socio-economic rights) as a demonstration of the accountability owed to the public.

It should be noted that social solidarity was explored in this thesis in order to develop a nuanced understanding of how embracing diversity serves as an expression of our shared humanity. Furthermore, the

anthropological concept of 'lived reality' was analysed in order to highlight the nature and extent of the suffering endured by vulnerable groups so as to fashion suitable laws to come to their aid. Thus, it is my contention that a display of unwavering accountability on the part of public officials in prioritising the needs of vulnerable groups (which is consistent with the communal obligations' focus of ubuntu) is a critical factor in forging a sustainable version of social solidarity in South Africa.

It is critical to emphasise that ubuntu, re-imagined as a philosophy in which the individual views his/her freedom as 'an act of responsibility to the community', is not premised on an individual embracing 'uniformity or sameness' in a specific community.¹⁹⁷³ Ubuntu in fact serves to inform and colour the exploration of the possible transformation of an individual (in this instance a public official) that elects to embrace his membership of an ethical community.¹⁹⁷⁴ The aforementioned insights are critical in shaping the conduct of public officials who heed the call to embrace membership of an ethical community (as well as subsequently safeguarding and strengthening that same ethical community) through prioritising the needs of vulnerable groups. The need for constructive dialogue (as well as giving effect to ongoing information dissemination on the part of the state) between public officials and the very people that they are meant to serve, is emphasised in order to create a just and caring nation-state.

The abovementioned insights regarding membership of an ethical community is an apt description of the aspirational goal (in forging and sustaining social solidarity ideals) as explored in this thesis. In addition, various anthropology themes have been analysed as a means to provide insight regarding the concept of 'lived reality' and the manner in which law is applied and/or revised and/or resisted on the ground. It is submitted that the aforementioned concept of 'lived reality' serves to draw attention to the plight of vulnerable groups. It is further submitted that developing an intimate understanding of the manner in which law is

¹⁹⁷³ Bohler-Müller N 'Ubuntu jurisprudence' (2012) 369.

¹⁹⁷⁴ Bohler-Müller N 'Ubuntu jurisprudence' (2012) 370.

experienced on the ground will ensure that laws are enacted that will provide the intended recipients (i.e. vulnerable groups) with the required assistance. The exploration of the aforementioned anthropological themes serves to inform the nature and extent of the (communal) obligations owed to vulnerable groups by the state which in turn promotes the accountability of the state as well as the consequent forging of social solidarity.

Consequently, it is my firm contention that ubuntu is well suited to make a critical contribution in promoting the accountability of public officials as well as bolstering social solidarity. Furthermore, the ethical and legal potency of ubuntu ¹⁹⁷⁵ in South Africa serves to demonstrate why ubuntu should be utilised in shaping a sanctuary in which all people (regardless of their perceived differences) are treated with equal respect. It follows that this will be achieved by prioritising the urgent needs of vulnerable groups through the progressive realisation of the aspirational values and socio-economic rights enshrined in the Constitution. Thus, the minimum core obligation approach (in prioritising urgent socio-economic rights as enshrined in the Constitution) dovetails neatly with the communal obligations' focus of ubuntu which also seeks to emphasise our interconnectedness and interdependence as members living side by side in a just and caring nation-state. Thus, diligent public officials (i.e. those officials that have demonstrated an unwavering focus on discharging their constitutional obligations) could in fact be viewed as embracing a nuanced understanding of ubuntu.

Furthermore, this body of work has sought to maintain a specific focus on the manner in which ubuntu could transform the lived reality of vulnerable groups as a means to make a meaningful contribution to the betterment of society. It is my firm contention that the communal obligations' focus of ubuntu conjures forth an attainable vision for creating a just and caring society in which all people are treated as having equal worth. However, the expectations of ubuntu (in forging a

¹⁹⁷⁵ Cornell D 'Exploring ubuntu-tentative reflections' available at www.fehe.org/index.php?id=281, (accessed 17 June 2016).

just and caring society) should be tempered in the absence of an economic transition to fundamentally transform the deplorable living conditions and deprivation endured by vulnerable groups.

6.5 Recommendations

6.5.1 The manner in which legislation is formulated and subsequently applied should take into account relevant anthropological insights in relation to the lived reality of specific vulnerable groups. There is a pressing need to engage in meaningful dialogue with specific vulnerable groups so as to ascertain key concerns as perceived by them (as opposed to public officials making assumptions about the critical concerns endured by those same vulnerable groups). In this regard working knowledge of anthropological themes (such as Intersectionality and semi-autonomous fields *et al*) on the part of public officials can make a pivotal contribution in informing and colouring the thinking of public officials as to the plight of specific vulnerable groups.

It is not necessary for anthropological research to be done prior to giving effect to a specific intervention by the state. However, it is submitted that adequate exposure to anthropology will inform and sensitise how public officials see the world around them. It is further submitted that this could lead to public officials making a meaningful and sustainable difference in the lives of specific vulnerable groups in securing access to key socio-economic rights. It follows that this will contribute to the most urgent needs of vulnerable groups in the community/nation-state being identified, suitably prioritised and subsequently realised. It is my firm belief that this is consistent with the communal obligations' focus of ubuntu in serving to inform and colour the duties owed by public officials to vulnerable groups in South Africa.

6.5.2 It is my firm contention that ubuntu, understood as an unwavering focus on communal obligations, should be utilised in creating a just and ethical society. Ubuntu, being a value with ethical and political potency, should be deployed to give effect to communal obligations (which does in fact

entail the sharing of resources) as a means of creating a law-abiding and caring nation-state.

It is necessary to emphasise that ubuntu is indeed capable of meshing with a human rights regime as enshrined in the Constitution. Consequently, it is submitted that the coercive edge of ubuntu (which serves to cast light on the conformity demanded by a philosophy premised on the primacy of communal obligations) should be embraced by the Constitutional Court in so far as it does not imperil core individual rights as enshrined in the Constitution. It is further submitted that an effective way for the Court to embrace ubuntu (while in no way sacrificing legal certainty) is through giving effect to the minimum core obligation approach as advanced by Bilchitz – the minimum core obligation will ensure an unwavering focus on the progressive realisation of the subsistence rights of vulnerable groups which mirrors the primary thrust of ubuntu in coming to the aid of interconnected and interdependent members of the community/nation-state who face imminent threats to their survival. Consequently, the minimum core obligation can contribute to bolstering economic equality through an awareness of how the provision of basic goods can improve the quality of lives of vulnerable groups.¹⁹⁷⁶

- 6.5.3** Bilchitz rightfully believes that both political equality as well as a certain measure of economic equality is required to forge a ‘decent society’.¹⁹⁷⁷ In this regard the Constitutional Court has a critical role to play in facilitating the formation and sustainability of the aforementioned ‘decent society’ by ensuring that the state progressively realises critical subsistence rights as enshrined in the Constitution.

It is submitted that the Court should utilise ubuntu to provide a nuanced understanding of the manner in which communal obligations can take pride of place (alongside core individual rights) in a constitutional democracy. In addition, the Panopticon provides an illuminating insight as to the manner in which generalised surveillance can regulate the

¹⁹⁷⁶ Bilchitz D ‘Giving socio-economic rights teeth’ (2002) *SALJ* 500.

¹⁹⁷⁷ Bilchitz D ‘Giving socio-economic rights teeth’ (2002) *SALJ* 500.

conduct of public officials so as to reflect unerring diligence and accountability in shaping a just and caring nation-state. In this regard it is submitted that the Constitutional Court should assert its legitimate authority by undertaking the overarching surveillance of the state in relation to progressively giving effect to socio-economic rights through careful scrutiny of the accountability/conduct of public officials (as representatives of the state).

It is submitted that possible allegations of the Constitutional Court undermining the separation of powers doctrine (in undertaking the abovementioned overarching surveillance) can be summarily dismissed. The aforementioned dismissal can be condoned on the basis that the focus of the Constitutional Court (as the guardian of the Constitution) is to facilitate the progressive realisation of the socio-economic rights as enshrined in the Constitution. It follows that the Constitutional Court should confine itself to ascertaining whether the course of action adopted by the state is in all likelihood going to progressively give effect to the aforementioned subsistence rights as a matter of urgency. It is further submitted that this should in fact be the preferred approach on the part of the Constitutional Court – the focus on the reasonableness of state conduct has had limited impact (in giving effect to subsistence rights) as it demands too little of the state in giving effect to critical subsistence rights as enshrined in the Constitution. In this regard the Constitutional Court should heed the General Comments as prepared by the UN Committee (in light of the ratification of the ICESCR by the Republic of South Africa) so as to ensure that there is proper alignment between relevant domestic legislation and our international law commitments. This will ensure that the favoured (but flawed) approach of the Constitutional Court, in ascertaining the ‘reasonableness of state conduct’ in giving effect to the progressive realisation of socio-economic rights, will in all likelihood be augmented so as to mirror the outputs of the minimum core obligation (in relation to critical subsistence rights) as endorsed by the ICESCR (and subsequently advanced by Bilchitz).

In addition, it is submitted that there is a pressing need for the Republic of South Africa to ratify the Optional Protocol to the ICESCR. This is necessary so that the public can benefit from additional mechanisms to drive the accountability of the state in displaying an unwavering focus on the progressive realisation of critical subsistence rights in the shortest possible time. Also, the ability of vulnerable groups to lodge individual complaints with the UN Committee (under the Optional Protocol to the ICESCR) is a critical mechanism to promote the accountability of the state in making every effort to prioritise the needs of vulnerable groups.

6.5.4 The role of the SAHRC needs to be revisited as it is well placed (by virtue of its constitutional mandate in receiving Reports from various state entities on an annual basis¹⁹⁷⁸) to do so much more in holding the state accountable in relation to the progressive realisation of subsistence rights. Furthermore, the SAHRC should play a critical facilitation role between the state, NGOs and vulnerable groups. In this regard it is submitted that the SAHRC can assume a crucial role in shaping the content of mandatory Reports that are to be prepared for submission to the UN Committee by the Republic of South Africa (in light of the ratification of the ICESCR).

Furthermore, it should be recalled that the Constitutional Court had sought/secured the assistance of the SAHRC in the *Grootboom* case so as to observe the implementation of the court order by the state as previously described. The SAHRC subsequently submitted a Report to the Constitutional Court to raise key concerns in relation to the implementation of the aforementioned court order. It follows that the possibility of the SAHRC periodically submitting a comprehensive Report to the Constitutional Court (as informed by the Reports furnished by the various state entities) should be explored so as to highlight progress achieved by the state in relation to the progressive realisation of socio-economic rights.

¹⁹⁷⁸ Section 184(3) of the Constitution of the Republic of South Africa, 1996.

In addition, the SAHRC should demonstrate a clear focus on information dissemination by the state so as to educate vulnerable groups about their constitutionally guaranteed socio-economic rights. In this regard valuable lessons can be extracted by the SAHRC (as well as relevant NGOs) from the manner in which the Treatment Action Campaign had compiled and prepared literature packs so as to provide vulnerable groups with critical information (in relation to the HIV virus and effective treatment protocols) and as a means of driving social mobilisation. It follows that the contents of a 'socio-economic rights literature pack' as prepared by the SAHRC could focus on the content of critical subsistence rights in the Constitution, the likely consequences of the recent ratification of the ICESCR and the need for the ratification of the Optional Protocol to the ICESCR. In addition, the 'socio-economic rights literature pack' could also provide vulnerable groups with guidance in relation to effective and co-ordinated social mobilisation strategies to engage with (and lobby) local public officials so as to hold them to account in terms of benchmarked socio-economic rights targets. In this regard the SAHRC could promote ongoing, constructive dialogue between all critical stakeholders in society (e.g. the state, the public, independent watchdogs and NGOs) in striving to create a society in which social solidarity is given expression through treating all people as having equal worth.

It is submitted that the SAHRC could make an extraordinary contribution (to the betterment of society) by adopting a more robust approach in the monitoring and enforcement of the realisation of socio-economic rights by the state.

6.5.5 Public officials should participate in (mandatory) induction training as well as (mandatory) annual refresher training. It was my experience, as the nodal point for criminal investigations at a state-owned enterprise, that induction/annual refresher training was an essential facet of promoting diligence and ethical behaviour amongst public officials – this served to ensure that the required level of accountability was clearly articulated and emphasised.

It is critical to emphasise in the abovementioned training that civil, political and socio-economic rights are interdependent and interconnected as this serves to augment the understanding of public officials that each and every one of them can make a critical contribution to their respective communities (which in turn fortifies the nation-state as a whole). The training should also serve to highlight that the progressive realisation of critical socio-economic rights is dependent on all public officials (in all spheres) discharging their duties diligently so as to ensure that the limited resources of the state are appropriately allocated and subsequently utilised in the optimal manner. In this regard the public officials should receive dedicated training as to the critical role of Section 195 in shaping and informing their approach and conduct in serving the public. Furthermore, the possibility of attracting adverse cost orders in their personal capacity should be emphasised (as a deterrent to unacceptable conduct as per the *AllPay* and *Black Sash* cases) in the induction/annual refresher programmes of senior public officials.

The training should also serve to prick the (social) conscience of public officials so as to acknowledge the privilege of serving the public as a privilege and honour in the mould of Cicero. The training programmes also provide an ideal environment for public officials to develop a nuanced understanding of the communal obligations' focus of ubuntu and how it meshes (as well as reinforces) the realisation of the aspirational values and socio-economic rights in the Constitution.

It is submitted that the SAHRC should provide this training in light of its core mandate as well as being well placed to consider how to augment the shortcomings of the state in light of the Reports received from various state entities on an annual basis. It is further submitted that the SAHRC can seek overarching approval from the Constitutional Court as to the contents of the training material. Furthermore, the SAHRC/Constitutional Court should direct that public officials should not aim for mere compliance with benchmarked sectoral targets but should be coaxed to attain stretch targets in light of the critical role of subsistence rights in fundamentally transforming the lives of vulnerable groups.

It will be exceedingly difficult to change the mindset of public officials (so as to embrace the serving of the public as a privilege) as borne out by my legal compliance and criminal investigative experience. It will indeed be a formidable challenge to create an environment in which public officials will display an unerring focus in giving effect to constitutionally guaranteed rights (and in so doing advance the communal obligations' focus of ubuntu). However, it is my submission that one must seek to provide the necessary framework/environment to promote such positive change amongst public officials in light of the seemingly permanent deprivation endured by fellow (vulnerable) members of our nation-state. If anything, the dismal failure of the state in meeting the basic needs of vulnerable groups (since the advent of democracy in South Africa) serves to highlight the need for the introduction of a suitable catalyst to bolster the accountability (as well as fortify the political will) of public officials. Thus, it is my firm contention that the mandatory training for public officials should emphasise the critical role that ubuntu could play in being a catalyst in creating the critical momentum – the point at which the state (as represented by public officials so transformed) will of its own volition begin to demonstrate an unwavering determination to materially transform the lives of vulnerable groups through a progressive realisation of socio-economic rights in the shortest possible time.

6.5.6 It is necessary to explore the illuminating insights offered by Robertson¹⁹⁷⁹ in highlighting the voluntary use of private resources which could be channelled by the state through the possible facilitation of land reform measures as well as raising taxes payable in the inheritance, property and net wealth spheres as previously described.¹⁹⁸⁰ It follows that a wealth tax (as well as significant tax deductions for charitable donations) should be considered so as to ensure that all citizens with the necessary means could make a suitable

¹⁹⁷⁹ Please see Section 3.6.2.1 at pages 180 -181 for insight as to the underlying philosophy of the state in contemplating the utilisation of certain funding mechanisms so as to meet the pressing needs of vulnerable groups.

¹⁹⁸⁰ Robertson R 'Measuring state compliance' (1994) 16 *Human Rights Quarterly* 700.

sacrifice in giving effect to constitutionally guaranteed socio-economic rights. In this regard Bilchitz rightfully believes that the extent of the sacrifice that has to be endured by members of society is linked to the urgency of individual needs that are yet to be satisfied.¹⁹⁸¹

It is my firm belief that ubuntu can play a meaningful role in assisting citizens with the necessary means to embrace the abovementioned sacrifices (i.e. discharging communal obligations as a means to ease the suffering of vulnerable groups) so as to forge a nation-state based on sustainable social solidarity principles. However, the aforementioned collection of revenue by the state (which should be ring-fenced for exclusive use in socio-economic rights realisation) should in no way dilute nor obscure the primary obligation, as borne by the state, to progressively give effect to constitutionally guaranteed rights/ICESCR commitments as a matter of urgency.

6.6 Summary

The underlying objective of this thesis has been to articulate the manner in which ubuntu, understood as an unwavering focus on communal obligations, could in fact promote the accountability of public officials in South Africa (as well as foster social solidarity) by facilitating the progressive realisation of constitutionally guaranteed socio-economic rights. Thus, it is of the utmost importance to recognise that ubuntu, suitably defined and properly contextualised, is indeed capable of making a telling contribution (in so far as promoting the accountability of public officials and forging social solidarity) in the constitutional democracy that is South Africa.

It is submitted that the Constitutional Court has a critical role to fulfil in undertaking overarching surveillance to hold the state accountable to give effect to the progressive realisation of socio-economic rights in terms of benchmarked sectoral plans as prepared by the state (and subsequently reviewed and approved by the Constitutional Court). It follows that public officials which display the necessary diligence and

¹⁹⁸¹ Bilchitz D *Poverty and Fundamental Rights* (2007) 86.

commitment in meeting the needs of vulnerable groups reflect the aspirational vision of forging a just and caring society.

In closing, it is my firm submission that this body of work has sought to maintain an unerring focus on transforming the lived reality of vulnerable groups so as to make a meaningful contribution to the betterment of society.

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Annexure 1

Please note that this is an unedited medical report, as prepared by a medical doctor, to provide frank details of the lived reality of a patient receiving renal dialysis.¹⁹⁸²

End Stage Renal Failure (ESRF) is a disease process that deprives both the patient and the family members that care for them of 'quality' of life.

Kidney disease and ultimately ESRF has various causes and can afflict individuals at any age. It may often afflict individuals in the prime of their lives as has been demonstrated in the recent death of Jonah Lomu.

Signs of renal failure (and hence those present in ESRF) include, amongst others:

- *Fever*
- *Malaise*
- *Rash*
- *Loss of appetite*
- *Vomiting*
- *Abdominal pain*
- *Muscle cramps and pain*
- *Swelling of tissues*
- *Headache*
- *Insomnia*
- *Dry skin*
- *Itching*

¹⁹⁸² Please note that the necessary background information for Annexure 1 is provided at Chapter 5.8.

- Irritability
- Changes in mental alertness

Individual symptoms as well as the rate of deterioration will vary from patient to patient, and would be influenced by the age of the individual and co-morbid conditions that they may suffer.

Access to adequate healthcare facilities and personnel are essential in ensuring that the suffering of the patient as well as the suffering and anguish of the family caring for the patient, are adequately addressed. As with so many things in South Africa this is directly linked to the socioeconomic setting of the patient. In my experience, patients from poorer economic areas who suffer from renal disease often consult with several healthcare providers prior to getting adequate treatment, at which stage they are more likely to be at end stage renal failure and requiring dialysis.

It is impossible to exactly determine by how much the lifespan of an individual would be increased should they start on dialysis as each case of ESRF would differ. However, there is no denying that the 'quality of life' of the individual would be greatly increased in this time period when compared to those patients who are not granted dialysis. This improvement in 'quality' is also shared by the family members who care for patients on dialysis.

In my experience as a GP, all patients with ESRF who have the opportunity to access dialysis and in so doing prolong their lives and improve their 'quality' of life are always eager to accept this form of therapy if they have the monetary means to do so.

I recently had a patient (who we will call Mrs X) who, at the age of eighty, was diagnosed with ESRF and was given the choice of dialysis. In her late 70's she had suffered a stroke and was subsequently confined to wheelchair during the days and required constant assistance with all her activities of daily living. Her main carer was her youngest daughter (who was neither married nor had children) and on occasion one of Mrs X's granddaughters assisted in this task. Her carer would see to all her needs which would include waking up repeatedly at night to comfort Mrs X. Needless to say this was an arduous task and I would

often find myself concluding my consultations with them by praising her daughter, who by the second year of caring for her frail mother looked permanently physically exhausted but somehow always managed to stay cheerful, and thanking her daughter for making my job easier by her caring for her mother so diligently.

Mrs X was very fearful of returning to hospital again since having suffered her stroke a few years before. She had always expressed to me her wish to be at home surrounded by her family, should her health deteriorate further. Mrs X had a large family, many of whom lived in other provinces, and thus most of her time was spent alone with her daughter at their family home.

Towards the middle of last year, after suffering a bout of urinary tract infections, it was noted that Mrs. X's renal function had deteriorated markedly. Based on the blood results she was now clinically in ESRF. Given her age and co-morbidity her life expectancy as a result of this diagnosis was only a few weeks at best. Her daughter had noted that her mother had become more restless, was complaining more of abdominal and muscle pain as well as complaining of pruritus (itching of her skin), in recent days. She also noted that her mother was not able to sleep well and was generally more irritable. This had put a great emotional strain on Mrs X's daughter and she was worried that she would not be able to enjoy the usual bitter-sweet relationship with her ailing mother, especially now that she had reached the final stages of life.

I explained to Mrs X's daughter that at this stage the only thing that may improve her mother's 'quality' of life, was dialysis. Despite coming from a 'previously disadvantaged community' Mrs X was fortunate that her son had put her on his medical aid and thus she was able to access dialysis at a private facility. I arranged for Mrs X and her daughter to consult a renal physician to explain all the aspects of dialysis prior to making any further decisions on how to proceed. I was aware of Mrs. X's 'hospital phobia' and I felt that if she was fully informed of all the benefits of dialysis her anxieties would be allayed. Despite her age, her physical state and her phobia of hospitals, Mrs X (and her daughter) in consultation with her extended family, unanimously decided to proceed with dialysis.

Mrs X attended regular dialysis sessions over the ensuing 3 months. She later passed away peacefully in her sleep whilst at home.

After Mrs X's passing her daughter came to see me to thank me for all my care. She was most grateful that Mrs X had dialysis as this had afforded her the time to contact all her family, both near and far. Mrs X had been well enough, both physically and emotionally, whilst on dialysis to interact with all visiting family members prior to her death. Mrs X's family had also expressed that dialysis had afforded her the best 'quality' of life before her death. In so doing they had been in a better position to deal with the loss of the 'heart' of the family.

There is no doubt in my mind that the 'quality of life' that is afforded to both the sufferer of ESRF and the family members who care for them, through the opportunity of accessing dialysis in the final stages of their lives, is something that should be made available to all sufferers of this disease no matter what their socioeconomic standing may be.